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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. ~~402~~ 106

JAMES F. JOY, THOMAS H. HUBBARD, EDGAR T. WELLES, AND O. D. ASHLEY, AS PURCHASING COMMITTEE; THE CENTRAL TRUST COMPANY OF NEW YORK AND JAMES CHENEY, TRUSTEES, AND THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, APPELLANTS,

vs.

THE CITY OF ST. LOUIS AND THE ST. LOUIS, KANSAS CITY AND COLORADO RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED SEPTEMBER 17, 1887.

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a In the Circuit Court of the United States for the Eastern District of Missouri.

CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*, Defendants.	Consolidated Cause. In Equity. Nos. 2357 and 2464.

The City of St. Louis and St. Louis, Kansas City and Colorado Railroad Company, intervenors.

1 & 2 *Stipulation.*

In the Circuit Court of the United States in and for the Eastern District of Missouri.

CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*, Respondents.	Nos. 2357 & 2464. Consolidated Cause.

In the matter of the intervening petition of the City of St. Louis and the St. Louis, Kansas City and Colorado Railroad Company for an order upon the receivers of said respondent company to permit said petitioning company to use certain tracks and rights of way through Forest Park, in the city of St. Louis, Missouri.

Now come the City of St. Louis, the St. Louis, Kansas City and Colorado Railroad Company, the Wabash, St. Louis and Pacific Railway Company, the Central Trust Company of New York, and James Chaney, trustees, and James F. Joy, O. D. Ashley,
3 & 4 Thomas H. Hubbard, and Edgar T. Welles, trustees, and sometimes styled "purchasing committee," and, for the purpose of simplifying the record in the above-entitled matter and *save* the copying in full of the record in the above consolidated cause, stipulate and agree that the following abstracts and recitals of the record and proceedings in said consolidated cause are true and correct statements of said record and proceedings so far as the same pertain thereto, and may be taken and accepted by the Supreme Court of the United States in the hearing of the appeal from the final decree in said intervening matter as of the same force and effect as if said record and proceedings were fully and at length embraced in the transcript of appeal herein; but these admissions are to be without prejudice to either party in any other proceedings or on any other occasion and are for the purposes of this suit only.

1. The Wabash, St. Louis and Pacific Railway Company, said respondent company, on the 27th day of May, 1884, filed
5 & 6 in said court its bill of complaint against said Central Trust Company of New York and others, respondents, setting

forth the existence of various mortgages and other encumbrances upon the lines of railroad and other property to it belonging, and particularly the mortgages hereinafter described, known as the "general mortgages" and "collateral trust mortgage;" that the interest to fall due upon said "general mortgage" on the 1st day of June, 1884, could not and would not be met by it, owing to lack of funds; that large sums of money were owing by it for money borrowed, supplies and materials purchased, and labor performed, which it had no funds to meet; that valuable and important property and interests were held by it under leases which would become forfeited upon non-payment of rentals, and praying the court, in order that said property might be preserved for the best interests of those entitled thereto and not be dissipated and lost through a multiplicity of suits and want of funds to meet immediate
7–11 obligations, to appoint one or more receivers to take charge of its entire property and preserve, manage, and operate the same in accordance with the practice of courts of equity.

2. The "general mortgage" aforesaid was executed by said Wabash, St. Louis and Pacific Railway Company as party of the first part, and said Central Trust Company of New York and James Cheney, trustees, parties of the second part, on the first day of June, 1880, which was duly and properly acknowledged and recorded on — day of ——, 1880, and is in the words and figures following, to wit:

12 EXHIBIT "A"

Wabash, Saint Louis and Pacific Railway Co.

General Mortgage.

This indenture, made and entered into this first day of June, 1880, by and between the Wabash, Saint Louis and Pacific Railway Company, of the first part, and the Central Trust Company of New York and James Cheney, of Indiana, trustees, of the second part, witnesseth:

Whereas the railroad of the first party is subject to the lien of various mortgages and deeds of trust which have at different times been made and charged by way of lien on sections of said railroad, which at said times belonged respectively to different railroad companies by whom the same were made; and

Whereas the aggregate indebtedness of said railroad companies now outstanding and secured as above approximates the sum of thirty-six millions of dollars; and

Whereas said first party has incurred a further indebtedness for equipment purchased by said first party for use upon said railroad, and has assumed obligations made by its predecessors and constituent corporations for like purchases; and

Whereas further purchases will be required, and also expenditures for permanent improvements; and

Whereas the aggregate of such indebtedness and such further

contemplated purchases and expenditures approximates the sum of six millions of dollars; and

Whereas said first party contemplates the extension of its railway by additional lines required to complete its system, and to be acquired by contract, purchase, lease, consolidation, or construction; and

13 Whereas it is further contemplated by said first party that such acquisitions will require for purchase, completion, improvement, and operation of the same a sum approximating eleven millions of dollars, to be secured by general lien, in addition to such sum as may in each instance be paid or secured by special lien; and

Whereas a meeting of stockholders of the said Wabash, Saint Louis and Pacific Railway Company was held at the office of the company in Saint Louis, Missouri, on the fifth day of May, 1880, of which meeting notice in writing, signed by all of the directors of said company, was served personally or by depositing the same in a post office, directed to the post-office address of each of said stockholders severally, with necessary postage for the transmittal of the same prepaid, at least sixty days prior to the day appointed for such meeting, and by advertising the same in some newspaper published in each county through or into which the road of said company extends, at least sixty days prior to the day appointed for such meeting; and

Whereas such notice stated the time and place of the meeting and the object thereof, the amount of the bonds of said company which it was proposed to issue and dispose of, and that it was proposed to secure said bonds by mortgage as above, and generally the purposes above set forth; and

Whereas at said meeting, by the concurrence of the holders of more than two-thirds in amount of the stock of such corporation, the following resolutions were adopted:

Resolved, That for retiring and paying the various obligations which are specific liens upon sections of the railway of this company, by virtue of deeds of trust or mortgage made by corporations formerly owning said sections respectively, and for the discharge of indebtedness for purchase of equipment incurred or assumed

14 by this company, and to provide means for the extension of the railroad of this company by the acquisition, through contract, purchase, lease, or consolidation, of such additional lines as may be necessary to complete the same, and for the purpose of completing, finishing, improving, and operating the railroad of this company as now existing or as hereafter extended, the board of directors of this company are hereby authorized to issue and dispose of the bonds of this company to the amount of fifty millions of dollars, and to secure the same by deed of trust or mortgage covering the entire property and franchises of this company as now held or hereafter to be acquired, so that as to future acquisitions by this company said mortgage shall be a lien inferior only to such liens as may be specifically charged upon the property acquired at or prior to the acquisition by this company thereof, and shall be assumed by this company as part of the condition of such acquisition.

Resolved, That said bonds shall be in such denominations as the board of directors shall approve, and shall be payable forty years after date, with interest at the rate of six per cent. per annum, payable semi-annually, which, with the principal, shall be payable at the office or agency of this company in the city of New York, in gold coin of the United States of present value; and there shall be written in said mortgage such provisions, by way of remedy or forfeiture in the event of default, as the board of directors may approve.

Resolved, That the fifty thousand bonds which are intended to be secured by the said mortgage shall from time to time hereafter be made, executed, and issued when and as authorized by resolutions of the board of directors, as sufficient capital stock of the company shall be fully paid and outstanding to authorize the same: without conflict with any law whereby the same would be otherwise
15 affected, the said bonds to be numbered consecutively and to be of the same denomination, form, tenor, and effect, and that when and as the said bonds shall be issued each and all thereof shall have the same rights, lien, and privilege of said mortgage, and shall be equally secured thereby without preference or priority as to lien or otherwise of any one over another, except as aforesaid, and with the like effect as though all of the said bonds had been made, executed, and issued on the day of the date of the said mortgage.

Whereas this indenture, with the provisions and trusts hereinafter contained, has been duly approved by said board of directors, and the said board has issued and is about to dispose of the bonds of this company as above set forth; and whereas said bonds to be executed and issued under the foregoing resolutions are to be of the form following, that is to say:

No. — UNITED STATES OF AMERICA. $1,000.

Wabash, St. Louis & Pacific Railway Company General Mortgage Bond.

Know all men by these presents that the Wabash, St. Louis & Pacific Railway Company, a consolidated corporation of Ohio, Indiana, Illinois, and Missouri, for value received, hereby promises to pay to the Central Trust Company of New York and James Cheney, trustees, or bearer, at its office or agency in the city of New York, on the first day of June, A. D. 1920, one thousand dollars in United States gold coin of the present standard of value, with interest thereon at the rate of six per cent. per annum, payable semi-annually, on the first days of June and December in each year, on
16 presentation and surrender of the annexed coupons as they severally become due, free of all taxes except such taxes as may be imposed by the laws of the State wherein the holder hereof shall have his domicile.

This bond is one of a series of fifty thousand bonds of one thousand dollars each, of like tenor and date, numbered from one to fifty thousand, the payment of the principal and interest of which is secured by an indenture of mortgage or deed of trust conveying to

the said trustees in trust the entire railroad, equipment, franchises, leaseholds, property, and income of said company now held or which may hereafter be acquired, subject only to such prior liens as now exist and such specific liens on future acquisitions as may be assumed as part of the condition of such acquisition.

If default shall occur in the payment of the interest upon any of said bonds and such default shall continue for six months, the principal of all of said bonds shall become due in the manner and with the effect provided in said mortgage or deed of trust.

It is, however, agreed between said company and the holder of this bond that no liability thereon shall be enforced against the individual estate of any stockholder of said company by virtue of any law of any State through which said railroad does now or may hereafter run.

Said company in such case hereby waives the benefit of any extension, stay, or appraisement laws now existing or that may hereafter exist.

This bond shall not become obligatory upon the company until the certificate endorsed hereon shall have been signed by the said trustees or one of them.

This bond shall pass by delivery or by transfer on the books
17 of said company in the city of New York. After registration of ownership, certified hereon by the transfer agent of said company, no further transfer except on the books of the company shall be valid unless transferred to bearer on said books, after which this bond shall pass by delivery, as at first, but shall continue subject to registration and transfer to bearer successively, at the option of each holder.

In witness whereof the said company has caused its corporate seal to be hereto affixed and the same to be signed by its president and secretary this first day of June, 1880.

WABASH, ST. LOUIS AND PACIFIC RAILWAY CO.,
By —— ——, *President*,
By —— ——, *Secretary*.

No. —. $30.

The Wabash, St. Louis & Pacific Railway Company will pay the bearer in the city of New York thirty dollars, in U. S. gold coin, on — day of ——, being six months' interest then due on the general mortgage bond No. —.

—— ——, *Treasurer*.

No. —. *Wabash, St. Louis & Pacific Railway Company* $1,000.
Six Per Cent. General Mortgage Bond.

Principal due June 1st, 1920; interest payable June 1st and December 1st, in the city of New York.

Trustees' Certificate.

18 We hereby certify that this bond is one of fifty thousand bonds, of $1,000 each, secured by and mentioned in the mortgage within referred to.

——— ———,
——— ———, *Trustees.*

Now, therefore, be it known that the Wabash, St. Louis & Pacific Railway Company, party of the first part, in consideration of the premises and in order to the security of the bonds hereinbefore described to the extent of fifty millions of dollars and no more, has this day granted, bargained, sold, conveyed, and transferred unto the said Central Trust Company of New York and James Cheney, of Indiana, trustees, their heirs and successors in said trust, all of the right of way and railroad of the said first party extending from the city of Toledo, in the State of Ohio, through the State of Indiana and thence into the State of Illinois to Meredosia, with branch of said road to Naples and East Hannibal, and from Meredosia to Camp Point, in the State of Illinois, and with branch of said road from Clayton to the east bank of the Mississippi river, at Hamilton, in said State, and with branch of said road leading from Decatur, in said State, to East St. Louis, in the same State; and also the railway of the party of the first part extending from St. Louis, in the State of Missouri, in a northwesterly direction to Kansas City, Missouri, with a lateral extension from Moberly, in the county of Randolph, to Ottumwa, in the State of Iowa, and a branch from Salisbury, in the county of Chariton, State of Missouri, to Glasgow, in the county of Howard, in said State, and also an extension from Brunswick, in said county of Chariton, in a northwesterly direction to the city of Council Bluffs, in the State of Iowa, which lines of railroad will, when united, form one continuous line of rail-
19 way in the same general direction from the waters of Lake Erie, at Toledo, Ohio, to the cities of Council Bluffs and Kansas City, on the Missouri river, as aforesaid, together with all the embankments, bridges, turnouts, side tracks, buildings and structures, water-tanks and fixtures, shops, engine and other houses, depots, turn-tables, engines, cars, machinery, tools, ferry and other boats, and every other thing appurtenant to said railroad or used in connection therewith belonging to the said first party, together with all rents, issues and profits, credits and choses in action, accruing to said first party from said railroad and appurtenances as owner and holder thereof.

And the said Wabash, St. Louis and Pacific Railway Company, in consideration of the premises above recited and for the further

security of the bonds above described, does hereby grant, bargain, sell, assign, transfer, and convey unto the said Central Trust Company of New York and James Cheney, trustees, their heirs and successors in said trust, all the right, title, and interest of said first party as the same now exists or may hereafter exist by virtue of any contract, lease, purchase, or consolidation in and to the following-described railroads now in process of amalgamation with the railroad of said first party, including with said railroads every appurtenance thereto or thing used in connection therewith, and all rents, issues, and profits arising therefrom to said first party, all of the above as fully as are above described, with reference to the railroad now owned and held by said first party and as fully as it is or may be possible for said first party to convey the same:

The Boone County and Booneville railway, extending from Centralia to Columbia, in the State of Missouri.

20 The St. Louis, Ottumwa and Cedar Rapids railway, extending from Moberly, in the State of Missouri, to Ottumwa, in the State of Iowa.

The St. Joseph & St. Louis railway, extending from New Lexington and Richmond and Lexington Junction to St. Joseph, in the State of Missouri.

The Brunswick & Chillicothe railway, extending from Brunswick to Chillicothe, in the State of Missouri.

The St. Louis, Council Bluffs & Omaha railway, extending from Chillicothe to Elm Flats, in the State of Missouri.

The Chicago & Paducah railway, extending from Effingham and Altamont to Streator, in the State of Illinois.

The Chicago & Strawn railway, extending from Strawn to Chicago, in the State of Illinois.

The Eel River railway, extending from Logansport to Butler, in the State of Indiana.

The Quincy, Missouri & Pacific railway, extending from West Quincy, in the State of Missouri, to the Missouri river opposite Brownsville, Nebraska.

The Missouri, Iowa & Nebraska railway, extending from Keokuk, Iowa, to a junction with the Omaha Division of the Wabash, St. Louis & Pacific railway, near the line between the State of Iowa and the State of Missouri.

The Champaign, Havana & Western railway, extending from Champaign to Havana, in the State of Illinois, and from White Heath to Decatur, in the State of Illinois.

The Toledo, Peoria & Western railway, extending from Warsaw, in the State of Illinois, to the State line of Indiana, and from La Harpe, in the State of Illinois, to Burlington, in the State of Iowa.

The Detroit, Butler & St. Louis railway, from Butler, in the State of Indiana, to Detroit, in the State of Michigan.

21 To have and to hold the said property, real and personal, including the said railroads, appurtenances, equipment, franchises, rights, credits, and choses in action, and every interest herein granted, unto the said trustees as joint tenants and not as tenants in common and the survivor of them, his heirs and successors; but

in trust, nevertheless, for the use and purposes herein declared and for the purpose of protecting and securing the holders of said fifty thousand bonds and each and every of them and upon the conditions following—that is to say:

The estate hereby conveyed and the lien of the trust hereby created shall be expressly subject and inferior to all such prior liens above referred to as are charged upon the several portions of the railroad and equipment of the railroad now of said first party and to the estate and lien of such specific trusts and mortgages or other obligations as may be hereafter made and charged by the said first party upon specific property which said first party hereafter may acquire and shall form part of the purchase-money or condition of the acquisition of the property so charged by said first party.

For the purpose of securing to the holders of any of said fifty thousand bonds that none of said bonds shall be issued except as above set forth, it is hereby stipulated on the part of said first party that the Central Trust Company of New York, one of the trustees herein, or its successor in said trust, shall certify and deliver said bonds as follows:

1. Said bonds to an amount not exceeding thirty-three millions of dollars shall be certified and delivered in such sums as may from time to time be required, at par value, to such persons as may present for exchange, at par value, bonds secured by any of the following-described prior liens upon portions of the railroad of the party of the first part:

22 First-mortgage bonds of the Toledo & Illinois Railroad Company, due as extended August 1st, 1890, for the sum of nine hundred thousand dollars, secured by a first mortgage on that part of the road of the party of the first part extending from Toledo to the westerly boundary of the State of Ohio, about seventy-five miles.

Bonds of the Toledo & Wabash Railroad Company, due as extended November 1st, 1893, for one million of dollars, secured by a second mortgage on that portion of the road of the party of the first part last above named; first-mortgage bonds of the Lake Erie, Wabash & St. Louis Railroad Company, due as extended August 1st, 1890, for the sum of two million five hundred thousand dollars, secured by a first mortgage on that part of the road of the party of the first part running entirely through the State of Indiana, about one hundred and sixty-eight miles.

Bonds of the Wabash & Western Railway Company, due as extended November 1st, 1893, for one million five hundred thousand dollars, secured by a second mortgage on that portion of the road of the party of the first part last named; first-mortgage bonds of the Great Western Railroad Company of 1859, due August 1, 1888, for the sum of two millions five hundred thousand dollars, secured by a mortgage of that part of the road of the party of the first part extending, in the State of Illinois, from Naples and Meredosia, as its western termini, to the boundary line between the State of Illinois and Indiana, about one hundred and seventy-nine miles.

Bonds of the Great Western Railroad Company of 1859, due May

1st, 1893, for two million five hundred thousand dollars, secured by a second mortgage on that part of the road of the party first named, about one hundred and seventy-nine miles.

23 Bonds of the Illinois & Southern Railroad Company, due August 1st, 1882, for three hundred thousand dollars, secured by a first mortgage on that part of the road of the party of the first part extending from Clayton to Carthage, in the State of Illinois, about thirty miles.

Bonds of the Quincy & Toledo Railroad Company, due November 1st, 1890, amounting to five hundred thousand dollars, secured by a first mortgage on that part of the road of the party of the first part lying between the west bank of the Illinois river, opposite Meredosia, and Clayton, in Illinois, about thirty-four miles.

Bonds of the Decatur & East St. Louis Railroad Company, due August 1st, 1889, amounting to twenty-seven hundred thousand dollars, secured by a first mortgage by said company on that part of the road of the party of the first part lying between Decatur and East St. Louis, in the State of Illinois, a distance of about one hundred and eight miles.

Bonds of the Wabash Railway Company, due June 1st, 1909, amounting to five hundred thousand dollars, secured by a first mortgage on that part of the road of the party of the first part extending from Naples, in Scott county, Illinois, to the Mississippi river at East Hannibal, a distance of about fifty miles.

Bonds of the Toledo, Wabash & Western Railway Company, known as consolidated bonds, due February 1st, 1907, secured by a mortgage on the whole line of the road owned by that company February 1st, 1867, and amounting to twenty-six hundred and ten thousand dollars.

Bond of the Wabash Railway Company, dated May 17th, 1879, and due April 1st, 1909, for two millions of dollars, secured by a mortgage on the lines of road owned by that company at the date of said mortgage, subject to the prior mortgages hereinbefore specified.

24 Bonds and scrip secured by funded coupons of the mortgage bonds of the Wabash Railway Company, amounting to two million nine hundred and forty-two thousand four hundred and fifty dollars.

Bonds of the North Missouri Railroad Company, due March 9th, 1895, amounting to six millions of dollars, secured by a first mortgage on the road of the party of the first part between St. Louis and St. Joseph Junction, Missouri, about two hundred and sixty-five miles.

Real estate and railway mortgage bonds of the St. Louis, Kansas City & Northern Railway Company, due September 1st, 1895, for three millions of dollars.

Bonds of the St. Louis, Kansas City & Northern Railway Company, called the St. Charles Bridge first-mortgage bonds, secured by a first mortgage on the bridge over the Missouri river at St. Charles, due October 1st, 1908, amounting to one million of dollars.

Bonds of the St. Louis, Kansas City & Northern Railway Com-

pany, called St. Charles Bridge second mortgage, due October 1st, 1903, for three hundred and eighty-eight thousand five hundred dollars, secured by a second mortgage on the bridge over the Missouri river at St. Charles.

2. Said bonds to an amount not exceeding six millions of dollars shall be certified and delivered to said first party in such sums from time to time as the board of directors shall by resolution declare to be required to reimburse or meet the expenditures of said first party for equipment and for other permanent improvement of its railroad.

3. The remainder of said bonds to an amount not exceeding eleven millions of dollars shall be certified and delivered to said first party in such sums from time to time as the board of directors of said first party shall by resolution appropriate to the purchase, con-
25 struction, or acquisition otherwise of such additional railroads, bridges, or connections as may, in the judgment of said first party, be required for the proper extension of its railway system; and as to any railroad so acquired the said first party hereby covenants that the application of said bonds shall not exceed fifteen thousand dollars, par value, for each mile of said railroad; and if, as one of the conditions of such acquisition, the first party shall assume or issue any obligation secured by a specific lien and as to such railroad a prior lien to that of the bonds secured hereby, the said sum of fifteen thousand dollars shall be taken to include such prior lien.

Whenever any of the bonds hereby secured shall be issued in exchange for bonds secured by prior liens upon the railroad and equipment now belonging to the party of the first part or which said first party shall hereafter acquire or the proceeds of any of the bonds secured hereby shall be applied in purchase of said prior bonds or any of them, then, in either case, whatever bond shall be so received in exchange or purchase shall not be cancelled, but shall be the property of said trustees as such and be retained as property belonging to their trust estate, and shall be so endorsed as shall prevent their application otherwise.

If the said Wabash, St. Louis and Pacific Railway Company or its successors or assigns shall well and truly pay or cause to be paid the several sums of money specified in the several bonds hereinbefore described, as well the principal as the installments of interest, according to the tenor and effect of said bonds and of each and every of them and of the laws of the several States of Ohio, Indiana, Illinois, and Missouri, or if said bonds and the interest payable thereon become in anywise paid or satisfied, then and in such
26 case the estate, right, title, interest, and demand of said parties of the second part, their successors in said trust and assigns, shall cease, determine, and become void; otherwise to be and remain in full force and virtue in law and for the benefit and security of the holders of said bonds and each of them.

Until default be made in the payment of the principal or interest of said bonds or of some or any of them the said railway company shall be permitted to possess, operate, manage, and enjoy said rail-

road, with its appurtenances, and to take and use the rents, incomes, tolls, issues, and profits thereof in the same manner and with the same effect as if this deed had not been executed.

In case default shall be made in the payment of any installment of interest accruing on said bonds or any of them, and such default shall continue for a period of six months after the maturity thereof, it shall be lawful for said parties of the second part or their successors in said trust, by themselves, their agents, or attorneys, to enter upon, take possession of, manage, operate, and control the railroad and property hereby conveyed, owned, or held by lease, contract, or otherwise, by superintendents, receivers, and managers thereof, making from time to time all needful repairs, replacements, and such alterations, additions, and improvements as may seem to be judicious and proper, and to collect and receive all rents, tolls, incomes, issues, and profits thereof, and, after deducting the expenses of operating said railroad and property and leasehold interests, and all costs of improvements and any taxes that may have accrued thereon, as well as just and reasonable compensation for their own work and labor in and about the premises, to apply the moneys arising therefrom to the payment of interest in the order in which it becomes due and ratably to the persons entitled thereto,
27 and when said interest so in default and any installment of interest subsequently maturing shall be paid up, then said parties of the second part shall restore the possession of said railroad to the said party of the first part.

If default shall occur in the payment of any instalment of interest, and such default continue for the space of six months after maturity and demand therefor, then if a majority in value of the holders of said bonds then outstanding and secured by this mortgage shall determine and notify said trustees that they require that the principal of all of said bonds become at once due and payable said bonds shall thereby become due and payable, notwithstanding any clause contained therein to the contrary, and if said principal sum shall become due and not paid by said first party according to the tenor of said bonds, and upon written notice by the holders of a majority of the bonds issued and outstanding under the authority hereinbefore mentioned, the said trustees shall have the power to enter upon and take possession of said railroad, with the appurtenances and all and singular the property and franchises hereby mortgaged, and the agents of the said railway company are hereby authorized and required to deliver up the same; and said trustees shall cause said mortgaged premises to be sold at public auction at the city of New York or at the city of Saint Louis, Missouri, as may be directed by the holders in interest of a majority of said bonds, giving at least sixty days' notice of the time and place and terms of sale and of the specific property to be sold, publishing the same in two daily newspapers in said city of New York and one in the cities of Toledo, Lafayette, Springfield, and Saint Louis; to adjourn said sale from time to time, if necessary in their opinion; and, if the same shall be adjourned,

to sell without further notice of the time and place of sale,
28 and to execute to the purchaser or purchasers a good and sufficient deed in fee simple for the same, which shall be a bar against the party of the first part and all persons claiming by, through, or under it of all right title, claim, or demand in and to the mortgaged premises or any part thereof, and out of the proceeds of such sale and the income that may have been received for the use, operation, and management of said road while in possession of such trustees, after deducting just allowances and expenses, as in the preceding article mentioned, to pay, first, the interest and, second, the principal of said bonds, ratably and with due regard to the successive maturity of different series of coupons, as far as said proceeds will go for that purpose, and in case any surplus should remain to pay the same over to the party of the first part; but in case it shall not be deemed proper or expedient, in all or any of the States in which the mortgaged premises are found, to seize and sell the same in pursuance of the power herein granted, then it shall be the duty of said trustees to proceed, in any proper tribunal, to foreclose said mortgage according to the usual and established principles of law and equity; but it is expressly understood and agreed between the parties that in no case whatever shall the party of the first part claim any right or advantage by reason of any valuation, appraisement, stay, or extension laws that now exist or may hereafter be enacted in any of the States in which said property exists or may be found, and said first-named party hereby releases to the second parties all and every such right, claim, and demand, and hereby further agrees that it will neither apply for an injunction nor any stay of proceedings to arrest or prevent such sale from being made or possession being taken, as hereinbefore provided.

29 It is hereby expressly declared that this instrument is made and the trust herein declared upon condition that if any sale shall be made under and by virtue of this mortgage, whether by judicial decree or foreclosure or in execution of the trust so created, either by judicial decree or otherwise, the holders of a majority of the said bonds then outstanding shall have the right to have said premises and all property herein embraced purchased for the use and benefit of all the holders of said then outstanding bonds.

In case such sale shall be made by any person or officer other than the trustees herein named or their successors, then the holders of the majority of said bonds outstanding shall have the right, by notice in writing, to require the said trustees or their successors to make such purchase on such terms as they in said notice shall prescribe; and in case said sale shall be made by said trustees, then the holders of a majority of said outstanding bonds shall have the right to appoint any other person whom they may choose to make such purchase on such terms as they may prescribe. If any person other than such trustees shall be so appointed, such appointment and the terms of purchase shall be in writing, a copy of which writing shall be delivered to said trustees or their successors before such sale.

And if the holders of a majority of said outstanding bonds shall elect to have said purchase made as aforesaid and shall prescribe the terms on which they desire to make the same, then it shall be the duty of said trustees or their successors or such other person as may be appointed as aforesaid to make such purchase if the same can be made on the terms so prescribed, and, having so purchased said premises and property, the right and title thereto shall vest in the said trustees or person so purchasing for the use aforesaid,
30 and no bondholder shall have any claim to the said premises or property or the proceeds thereof except his *pro rata* share therein, as represented by a new company or corporation to be formed for the use and benefit of the holders of all said bonds then outstanding; and said trustees or person making said purchase shall take such lawful measures as may be deemed for the interest of all said bondholders to organize a new company or corporation; said company or corporation to be so organized upon such terms, conditions, or limitation and in such manner as the holders of a majority of said outstanding bonds shall in writing request or direct; and thereupon the said trustees or other person making said purchase shall convey said premises and property to the new company or corporation; and it is hereby declared that all persons who shall claim any interest, benefit, or advantage by virtue of this instrument or the trust hereby created shall take the same subject to all the terms herein contained and subject to all the rights and powers conferred by this instrument on the holders of a majority of the bonds hereby secured.

It is further declared that in case of any sale of the premises and property embraced herein, by decree of any court or otherwise, the holders of a majority of the bonds then outstanding shall have the right to determine whether said premises and property shall or shall not be sold subject to all prior encumbrances, and such majority shall sufficiently manifest their determination in such respect by giving notice thereof in writing to the trustees or person making such sale at any time before such sale is made.

In case of the resignation or incapacity of the trustees or either of them herein named to act as trustee or in case of the death, resignation, or incapacity to act of any successor of said
31 trustees it shall be the duty of the board of directors of said railway company immediately thereafter to make application to some proper court of record at the county where the general office of said railway company is located for the appointment of some suitable person, persons, or corporation to become the successor of said trustees; and thereupon the person, persons, or corporation so appointed shall be, and are hereby, vested with all the estate, rights, and privileges and liable to all the duties by this instrument conferred upon or to the parties of the second part to the same extent as if each person, persons, or corporation were herein named.

It is hereby agreed and understood that for the better assurance to the parties of the second part and to the holders of the bonds secured by this instrument the party of the first part agrees that it will, on demand, at any and all times hereafter, make, execute, and

deliver all such other and further conveyances and assurances for the better assuring unto said trustees and their successors in the trust hereby created the said railroad, with appurtenances, equipment, and property hereinbefore described or intended so to be, and all other property belonging to said party of the first part now owned or hereafter to be *required*, as above provided and set forth, or any and all the franchises now held or hereafter to be acquired by the party of the first part as said trustees or their successors, by their counsel, shall reasonably advise, devise, or require.

Whenever it shall happen from changes required to be made in said railroad and appurtenances that any parcels of property, whether real or personal, have become unnecessary or useless to the said railroad company for its business by reason of change of line or depot or other grounds, or when any of the personal property shall have become worn out or inefficient and unnecessary to the
32 operation of said railroad, then and in such case it shall be lawful for the directors of said railway company to make sales, exchanges, or other disposition of such parcels of real or personal property as they may deem for the best interest of said railway company, and upon the sale or exchange of such property for any other, and when any other property shall be acquired in the place of such property the same shall be held subject to the lien of this mortgage as if it was the property of said company at the date hereof, and the parcels of property so held and disposed of by said directors shall be exempt from the lien herein created.

It is further agreed that neither of said trustees shall be required to take any action under this deed, in the event of default, until the party asking such action shall have indemnified such trustee for expenditure necessarily involved.

In witness whereof the said party of the first part—that is to say, the said Wabash, Saint Louis & Pacific Railway Company—has caused these presents to be signed in its incorporate name by Solon Humphreys, president, and attested by James F. How, its secretary, with the corporate seal of said company hereto, as authorized and directed by its board of directors, the day and year above written.

WABASH, SAINT LOUIS & PACIFIC RAILWAY COMPANY,
By SOLON HUMPHREYS, *President.*

Attest: JAMES F. HOW, *Secretary.*

Signed and sealed in the presence of—
WM. J. HARDING.

33 STATE, COUNTY, AND CITY OF NEW YORK, *ss:*

Be it remembered that on this seventh day of June, 1880, personally came before me the undersigned, a notary public within and for the county aforesaid, Solon Humphreys, who, being by me duly sworn, did depose and say that he is the president of the Wabash, Saint Louis & Pacific Railway Company, grantor in the foregoing instrument; that the name of said company is signed to said instru-

ment by him and by virtue of the order of the board of directors of said company, as president thereof; that the seal of the company attached thereto is the proper and genuine seal of the said railway company, and is affixed thereto by order of said board of directors; and the said Solon Humphreys, president, acknowledged the foregoing instrument to be the act and deed of the Wabash, Saint Louis & Pacific Railway Company for the uses and purposes therein expressed.

[NOTARIAL SEAL.] In witness whereof I have hereunto set my hand and affixed my notarial seal of office this seventh day of June, A. D. 1880.

WM. J. HARDING,
Notary Public, Kings County, State of New York.

Certificate filed in New York county.

STATE OF MISSOURI, } ss:
City and County of St. Louis, }

Be it remembered that on this — day of June, 1880, personally came before me the undersigned, a notary public within and
34 for the county aforesaid, James F. How, who, being by me duly sworn, did depose and say that he is the secretary of the Wabash, Saint Louis & Pacific Railway Company, grantor in the foregoing instrument; that he countersigned said instrument and affixed the seal of said company thereto by order of the board of directors thereof.

In witness whereof I have hereunto set my hand and affixed my notarial seal of office this — day of June, A. D. 1880.

35 & 36 The lien of said "general mortgage" upon the right of way and railroad, to wit, "extending from St. Louis, in the State of Missouri, in a northwesterly direction to Kansas City, Missouri, with a lateral extension from Moberly, in the county of Randolph, to Ottumwa, in the State of Iowa," being inferior and subject to the lien of a mortgage covering said property, executed on the 12th day of August, 1874, by the St. Louis, Kansas City and Northern Railway Company, as party of the first part, and the Farmers' Loan and Trust Company of the City of New York, party of the second part.

The bonds secured by last mortgage mentioned, to wit, about $3,000,000 in value, are still outstanding and unpaid.

Subsequent to the execution of said last-mentioned mortgage, to wit, on the 14th day of August, 1879, the railroad and property of said St. Louis, Kansas City and Northern Railway Company was, by an instrument of agreement executed on that day, consolidated with the railroad and property of a corporation known as the
37 & 38 Wabash Railway Company, and by such consolidation a new corporation was formed, to wit, said Wabash, St. Louis and Pacific Railway Company.

3. The said "collateral trust mortgage" was made and executed on the 1st day of May, 1883, by and between the said Wabash, St. Louis and Pacific Railway Company, of the first part; the Mercantile

Trust Company of New York, of the second part, and the St. Louis, Iron Mountain and Southern Railway Company, of the third part, to secure certain negotiable bonds issued by said party of the first part, of which bonds about $10,000,000 are outstanding, unpaid. Said mortgage covered certain bonds, shares, real estate, and other property.

4. The tracks and right of way, the use of which is asked by said intervenor, the St. Louis, Kansas City and Colorado Railroad Company, constitute a part of the right of way and railroad hereinbefore recited, embraced in said "general mortgage" executed by
39 & 40 said St. Louis, Kansas City and Northern Railway Company.

5. On the 27th day of May, 1884, by order of said court, Solon Humphreys and Thomas E. Tutt were appointed receivers of all the railroads and property of said Wabash, St. Louis and Pacific Railway Company, with all the power and subject to the liabilities and duties pertaining to receivers appointed by courts of equity.

6. On the 9th day of June, 1884, there was filed in said court in said cause No. 2357 by leave of court the cross-bill of said Central Trust Company of New York and James Cheney, trustees, under said "general mortgage," setting up default in the installment of interest due June 1st, 1884, and praying for the foreclosure of said "general mortgage" and certain mortgages executed in aid of said "general mortgage," and styled in said cross-bill "sustaining mortgages," and the sale of the property covered thereby, and for a receiver.

41 & 42 7. On the 15th day of June, 1884, there was filed in said cause No. 2357 by leave of court an amended bill of complaint by said Wabash, St. Louis and Pacific Railway Company, setting forth with more particularity than in said original bill the condition of the lines of railroad belonging to said company, the titles of said company to the various parts thereof, the liens and encumbrances thereon, and the financial condition of said company. Said amended bill embraced additional parties *of* defendant, and prayed substantially the relief asked in said original bill.

8. On the 14th day of October, 1884, there was filed in said court in said cause No. 2357 by leave of court the amended cross-bill of said Central Trust Company of New York and James Cheney, trustees, praying substantially the relief asked in their cross-bill filed as aforesaid on the 9th day of June, 1884.

9. On the 13th day of January, 1885, the said Central Trust
43–46 Company of New York and James Cheney, trustees, filed in the circuit court of the city of St. Louis, State of Missouri, their petition (bill) against said Wabash, St. Louis and Pacific Railway Company and others, defendants, praying substantially for the relief prayed for in their said cross-bill filed as aforesaid in said United States circuit court on the 9th day of June, 1884.

And on the 16th day of January, 1885, said petition filed in said circuit court, city of St. Louis, was on motion removed to said United States circuit court, and became cause No. 2464 in said last-mentioned court.

10. And on the 19th day of March, 1885, by order of court said causes No-. 2357 and 2464 were consolidated.

11. On the 6th day of January, 1886, said consolidated cause came on for final hearing before said court, and the following decree of foreclosure and sale was entered, to wit:

47 EXHIBIT "B."

In the Circuit Court of the United States for the Eastern District of Missouri. September Term, A. D. 1885. In Equity.

THE CENTRAL TRUST COMPANY OF NEW YORK and Others *against* THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY and Others. } Nos. 2357 and 2464. Consolidated Cause.

Decree of Foreclosure and Sale, January 6th, 1886.

Now, on this day, came the following parties, by their solicitors namely:

The Central Trust Company of New York, James Cheney, The Wabash, St. Louis & Pacific Railway Company, The Mercantile Trust Company of New York, The St. Louis, Iron Mountain
48 & Southern Railway Company, Solon Humphreys, John T. Terry, and all the other defendants who have answered the bill of the Central Trust Company of New York and James Cheney or the bill filed by the said complainants in the State court and removed to this court or the cross-bill filed by the Mercantile Trust Company of New York, viz:

1. Anthony J. Thomas, } As trustees of the Cairo Division.
2. Charles Edward Tracy, }
3. United States Trust Company of New York.
4. Quincy, Missouri & Pacific Railroad Co.
5. Charles H. Bull.
6. Amos Green.
7. Henry F. Spaulding.
8. St. Joseph & St. Louis Railroad Co.
9. St. Louis Bridge Co.
10. The Tunnel Railroad of St. Louis.
11. St. Louis, Council Bluffs & Omaha Railroad Co.
12. James B. Eads.
13. Joseph A. Jamison.
14. Charles Parsons.
15. Isaac H. Knox.
16. Geo. E. Leighton.
17. Louis H. Meyer.
18. Michigan City & Indianapolis Railroad Co.
19. William Nichols.
20. Geo. S. Coe.
21. Indianapolis, Peru & Chicago Railway Co.

22. German Savings Institution.
23. Boone County and Booneville Railway Co.
24. Brunswick & Chillicothe Railway Co.
25. Geo. M. Rice.
26. Edward P. Burnham.
27. John Kimball.
28. Chicago, Cincinnati & Louisville Railroad Co.
29. Clarinda & St. Louis Railroad Co.
30. Geo. I. Seney.
31. Geo. T. M. Davis.
32. Des Moines Northwestern Railway Co.
33. Farmers' Loan and Trust Co.
34. Henry W. Ford.
35. Richard S. Brock.
36. J. P. Giraud Foster.
37. Edward K. Goodnow.
38. John M. Woodson.
39. Robert A. Betts.
40. Alexander M. White.
41. Henry H. Worden.
42. James R. Jesup.
43. John N. A. Griswold.

And it appearing to the court that all the defendants to the bills of complaint aforesaid have entered their appearance herein or have been duly served with process herein or have been notified of the pendency of this cause by personal service or by publication, as heretofore ordered by the court, such service of process or notice being given and such publication having been made more than twenty days before the first Monday of October, A. D. 1885;

It also appearing to the court that the following trustees have either resigned their trusts or departed this life, namely:

1. Edwin D. Morgan.
2. H. F. Vail.
3. O. H. Browning.
4. Abram W. Hendricks.
5. Lucien Tilton—

The court finds that the trusts represented by the parties above named as having resigned their trusts or departed this life are fully represented in this cause, or that such trusts will not be affected by this decree.

The court also finds that of the parties defendant served with process or notified as aforesaid a large number have been defaulted more than a month before the rendition of this decree and the original and removed bills of the Central Trust Company and James Cheney taken for confessed against them and each of them, viz:

1. John R. Lionberger.
2. Attica, Covington and Southern R. R. Co.
3. Champaign and Southeastern R'y Co.
4. Havana, Rantoul and Eastern R. R. Co.
5. Des Moines and St. Louis R. R. Co.
6. Council Bluffs and St. Louis R'y Co.

7. Humeston and Shenandoah R. R. Co.
8. St. Louis, Ottumwa and Cedar Rapids R. R. Co.
9. Alfred T. White.
10. Daniel A. Lindley.
11. Wager Swayne.
12. Clifford A. Hand.
13. Robert C. Martin.
14. George J. Gould.
15. John Paton.
16. David J. Tyson.
17. Charles E. Whitehead.
18. William Hill.

51 19. Theodore Gilman.
20. Edward De Rose.
21. Henry A. Mott.
22. Charles Jackson.
23. G. M. Whittemore.
24. James H. Britton.
25. Townsend Underhill.
26. William H. Ladd.
27. J. C. Rogers.
28. Benjamin Ham.
29. Archibald Hopkins.
30. James Compton.
31. Abram W. Hendricks.
32. Thomas B. Coulter.
33. Thomas Mayo.
34. Philip Henry Brown.
35. Metropolitan National Bank.
36. Eel River R. R. Co.
37. Toledo, Peoria & Western R. R. Co.
38. St. Louis, Jerseyville & Springfield R. R. Co.
39. Peoria & Pekin Union R. R. Co.
40. Chicago & Western Indiana R. R. Co.
41. Chicago, St. Louis & Pittsburgh R. R. Co.
42. Hannibal Bridge Co.
43. Missouri, Iowa & Nebraska R. R. Co.

The court finds and adjudges that because the bills so filed by the Central Trust Company and James Cheney and the cross-bill filed by the Mercantile Trust Company of New York cover and embrace all the rights and equities upon which the property hereinafter described can or ought to be sold by decree or decrees of this

52 court in this cause it will not be necessary to found this decree on the original or amended bills of the Wabash, St. Louis & Pacific Railway Company or the prayers thereof, but said last-named bills will be retained by the court for the purpose of adjusting all such rights as have arisen under the same, but not for the purpose of foreclosing under the prayers thereof any of the instruments hereinafter described.

And now, this cause coming on for final hearing on the original removed bill and cross-bills of the Central Trust Company of New

York (to be called hereafter The Central Trust Company for the sake of brevity) and James Cheney, the cross-bill of the Mercantile Trust Company, the answer of the Wabash, St. Louis & Pacific Railway Company (to be called hereinafter The Wabash Company for the sake of brevity), and all other answers to the above bills of parties appearing of record, with all replications, exhibits, reports of masters or commissioners to whom any of the questions or issues herein presented were referred, and also all evidence taken in said cause relating to said questions and issues, and all replications of the parties or any of them, and also upon the default of all parties who have suffered default as aforesaid;

And the court, having heard the arguments of counsel and being fully advised in the premises, finds and adjudges:

On the first day of June, A. D. 1880, the Wabash Company was a body corporate formed by the consolidation of certain other corporations
organized under the laws of the States of Ohio, Indiana, Illi-
53 nois, and Missouri, and that said company then owned certain
lines of railroad formerly owned by other bodies or parties, with all the property, real and personal, and all the franchises thereof; that said Wabash Company was then acquiring or in contemplation of acquiring still other lines of railroad, with the property and franchises thereof, by lease, consolidation, or otherwise; all of which lines so owned or held or so about to be acquired will be more fully described hereinafter.

On the first day of June, A. D. 1880, the said Wabash Company, for the purpose of securing an intended issue of its mortgage bonds to the amount of fifty millions of dollars (to be known as "general mortgage bonds") and the payment of the principal and interest thereof, duly executed and delivered to the Central Trust Company of New York and James Cheney, of Indiana, as trustees, its mortgage or deed of trust (known as "the general mortgage"), and thereby conveyed to said trustees, for the purposes in said general mortgage fully set forth, certain lines of railroad and certain interests as the same then existed or might thereafter exist in and to certain other lines of railroad, with all the property and franchises, rights, income, and choses in action pertaining thereto. The lines of railroad and property and interests specifically described and defined in said mortgage (such description being hereby adopted) and the extent of the lien thereby created as against certain other liens are set forth in said mortgage as follows, such enumeration, however, not embracing other lines of railroad afterwards acquired by
the Wabash Company and to which the lien of said general
54 mortgage afterwards attached:

"All of the right of way and railroad of the said first party extending from the city of Toledo, in the State of Ohio, through the State of Indiana, and thence into the State of Illinois to Meredosia, with branch of said road to Naples and East Hannibal, and from Meredosia to Camp Point, in the State of Illinois, and with branch of said road from Clayton to the east bank of the Mississippi river at Hamilton, in said State, and with branch of said road leading from Decatur, in said State, to East St. Louis, in the same State;

and also the railway of the party of the first part extending from St. Louis, in the State of Missouri, in a northwesterly direction to Kansas City, Missouri, with a lateral extension from Moberly, in the county of Randolph, to Ottumwa, in the State of Iowa, and a branch from Salisbury, in the county of Chariton, State of Missouri, to Glasgow, in the county of Howard, in said State; and also an extension from Brunswick, in said county of Chariton, in a northwesterly direction to the city of Council Bluffs, in the State of Iowa, which lines of railroad will when united form one continuous line of railway, in the same general direction, from the waters of Lake Erie at Toledo, Ohio, to the cities of Council Bluffs and Kansas City, on the Missouri river, as aforesaid, together with all the embankments, bridges, turnouts, side tracks, buildings, and structures, water-tanks and fixtures, shops, engine and other houses, depots, turn-tables, engines, cars, machinery, tools, ferry and other boats, and every other thing appurtenant to said railroad or used in
55 connection therewith belonging to the said first party, together with all rents, issues and profits, credits and choses in action accruing to said first party from said railroad and appurtenances as owner and holder thereof.

"And the said Wabash, St. Louis and Pacific Railway Company, in consideration of the premises above recited and for the further security of the bonds above described, does hereby grant, bargain, sell, assign, transfer, and convey unto the Central Trust Company of New York and James Cheney, trustees, their heirs and successors in said trust, all the right, title, and interest of said first party as the same now exists or may hereafter exist by virtue of any contract, lease, purchase, or consolidation in and to the following-described railroads now in process of amalgamation with the railroad of the said first party, including with said railroads every appurtenance thereto or thing used in connection therewith, and all rents, issues, and profits arising therefrom to the said first party; all the above as fully as above described with reference to the railroad now owned and held by said first party and as fully as it is or may be possible for said first party to convey the same:

"The Boone County and Booneville railway, extending from Centralia to Columbia, in the State of Missouri;

"The St. Louis, Ottumwa and Cedar Rapids railway, extending from Moberly, in the State of Missouri, to Ottumwa, in the State of Iowa;

56 "The St. Joseph and St. Louis railway, extending from New Lexington and Richmond and Lexington Junction to St. Joseph, in the State of Missouri;

"The Brunswick and Chillicothe railway, extending from Brunswick to Chillicothe, in the State of Missouri;

"The St. Louis, Council Bluffs and Omaha railway, extending from Chillicothe to Elm Flats, in the State of Missouri;

"The Chicago and Paducah railway, extending from Effingham and Altamont to Streator, in the State of Illinois;

"The Chicago and Strawn railway, extending from Strawn to Chicago, in the State of Illinois;

"The Eel River railway, extending from Logansport to Butler, in the State of Indiana;

"The Quincy, Missouri and Pacific railway, extending from West Quincy, in the State of Missouri, to the Missouri river opposite Brownsville, Nebraska;

"The Missouri, Iowa and Nebraska railway, extending from Keokuk, Iowa, to a junction with the Omaha Division of the Wabash, St. Louis and Pacific railway, near the line between the State of Iowa and the State of Missouri;

"The Champaign, Havana and Western railway, extending from Champaign to Havana, in the State of Illinois, and from White Heath to Decatur, in the State of Illinois;

"The Toledo, Peoria and Western railway, extending from Warsaw, in the State of Illinois, to the State line of Indiana, and
57 from La Harpe, in the State of Illinois, to Burlington, in the State of Iowa;

"The Detroit, Butler and St. Louis railway, from Butler, in the State of Indiana, to Detroit, in the State of Michigan; to have and to hold the said property, real and personal, including the said railroads, appurtenances, equipment, franchises, rights, credits, and choses in action, and every interest herein granted, *that* the said trustees as joint tenants and not as tenants in common, and the survivor of them, his heirs and successors; but in trust, nevertheless, for the use and purposes herein declared and for the purpose of protecting and securing the holders of said fifty thousand bonds and each and every of them, and upon the conditions following, that is to say:

"The estate hereby conveyed and the lien of the trust hereby created shall be expressly subject and inferior to all such prior liens above referred to as are charged upon the several portions of the railroad and equipment of the railroad now of said first party and to the estate and lien of such specific trusts and mortgages or other obligations as may be hereafter made and charged by the said first party upon specific property which said first party hereafter may acquire, and shall form part of the purchase-money or condition of the acquisition of the property so charged by said first party."

The court further finds and adjudges that, in addition to the lines of railroad specifically described in said general mort-
58 gage, the lien thereof also attached to all the right and title of the Wabash Company in and to all the following railroads, property, franchises, rights, and interests, whether acquired before or after the execution of the said general mortgage and whether acquired by purchase, lease, or consolidation of contract, viz:

The Clarinda and St. Louis railway, being 10.1 miles long in the State of Missouri and 11.7 miles in the State of Iowa, making a railroad 21¾ miles in length, extending from Clarinda, Iowa, to Roseberry, Missouri. Said Wabash Company acquired title in fee to the Missouri portion of said railroad and a leasehold title to the remainder.

The Peoria, Pekin and Jacksonville railroad, extending from Pekin, Illinois, to Jacksonville, Illinois, a distance of 72.2 miles, said railroad having been acquired by purchase July 25, 1881.

The Springfield and Northwestern railroad, extending from Springfield, Illinois, to Havana, Illinois, a distance of 44.1 miles, said railroad being acquired by purchase July 30, 1881.

The Centreville, Moravia and Albia railroad, extending from Centreville, Iowa, to Albia, Iowa, a distance of about 25 miles. Said railroad was leased to the Missouri, Iowa and Nebraska Railroad Company and came to the Wabash Company with the property of said last-named company.

The Des Moines and St. Louis railroad, extending from Des Moines, in the State of Iowa, to Albia, in said State, through the counties of Polk, Marion, and Monroe, in said State, a dis-
59 tance of 67.3 miles, leased to the Wabash Company on the first day of March, 1882.

The St. Louis, Jerseyville and Springfield railroad, extending from Grafton, Illinois, to a point near Bates, Illinois, a distance of 71.4 miles. Said railroad was acquired by lease August 6, 1881.

The Attica, Covington and Southern railroad, extending from Attica, Indiana, to Covington, Indiana, a distance of 14½ miles, leased to said Wabash Company July 18, 1881.

The Michigan City and Indianapolis railroad, extending from Michigan City to La Porte, Indiana, a distance of 12.75 miles, leased to the Wabash Company June 1st, 1881.

The Indianapolis, Peru and Chicago railroad, extending from Indianapolis, Indiana, to Peru, Indiana, a distance of 75 miles, leased to said Wabash Company June 1st, 1881.

The Braidwood Branch, being a line ten and nine-tenths miles long, extending from near Braidwood, Illinois, to the Chicago Branch of the Wabash railroad. Said branch is partially constructed, and was built by moneys arising from the sale of general mortgage bonds aforesaid.

The Champaign and Southeastern railroad, extending from Champaign, Illinois, to Sidney, Illinois, a distance of 11.6 miles, which was leased by the Wabash Company March 1st, 1882.

The Madison County railroad, extending from Edwardsville, Illinois, to its junction with the Chicago and Alton railroad, a distance of 8.5 miles, acquired by the Wabash Company by purchase.
60 The Humeston and Shenandoah railroad, extending from Humeston to Shenandoah, Iowa, a distance of 113 miles, in which the Wabash Company owns a one-half interest.

Certain real estate and terminal privileges in Burlington, Iowa, more particularly described in mortgage hereinafter referred to.

The bridge over the Mississippi river at St. Louis, with the tunnel and terminal rights in said city, leased by said Wabash Company and the Missouri Pacific Railway Company, as set forth in a certain lease hereinafter referred to.

The bridge over the Mississippi river at Hannibal, Missouri, leased by the two last-named companies, as set forth in a lease hereinafter referred to.

Certain right of use of the bridge over the Missouri river at Kansas City, Missouri, held under a lease or contract with Hannibal and St. Joseph Railroad Company, hereafter referred to.

The right to use certain tracks and terminal facilities in Cook county, Illinois, and in Chicago, Illinois, under lease or contract with the Chicago and Western Indiana Railroad Company, hereinafter referred to.

The right to use certain tracks and terminal facilities owned by the Peoria and Pekin Union Railway Company in Illinois under contract with said last-named company, dated February 1st, 1881, hereafter referred to.

The right to use certain tracks and depot facilities in the
61 Union depot in Kansas City, Missouri, under contract with the Kansas City Depot Company, dated June 1st, 1876, hereinafter referred to.

The right to use certain tracks and depot facilities in the Union depot in Hannibal, Missouri, under contract with Hannibal Depot Company, dated June 30, 1881, hereinafter referred to.

The right to use certain tracks and depot facilities in the Union depot in St. Joseph, Missouri, under contract with St. Joseph Union Depot Company, dated September 2, 1880.

The right to use certain tracks and depot facilities in the Union depot at Detroit, Michigan, under contract October 20, 1881, hereinafter referred to.

The right to use certain tracks extending from Clayton, Illinois, to Quincy, Illinois, and certain depot and station facilities in said last-named city, said right arising under a contract or lease, dated January 1st, 1878, between the Chicago, Burlington and Quincy Railway Company and said Wabash Company.

An interest in the Elevator Company at Council Bluffs, Iowa, upon which a payment to the amount of $41,666.66 has been made by the Wabash Railway Company, for which no certificate has been issued.

Three hundred coal cars acquired from the National Rolling Stock Company November 23d, 1883, under an agreement to pay mileage on the same, with privilege of purchase at end of any one year, etc.

The following tracts or parcels of land, the title to which
62 was taken in the name of James F. How, as trustee, before the appointment of receivers in this cause:

Marion county, Iowa:

Lot 6, subdiv. of S. 7, T. 77, R. 21.

In the city of Chicago, State of Illinois:

In the assessor's div. of N. W. $\frac{1}{4}$ of W. $\frac{1}{2}$ N. E. $\frac{1}{4}$ sec. 32, T. 39 N., R. 14 east; block 13.

In Brown's Addition in the N. E. $\frac{1}{4}$ sec. 32, T. 39 N., R. 14 E.; lot 8, in block 3; lots 8, 9, 43, 44, in block 4.

Gallaher's subdiv. of the S. $\frac{1}{2}$ of block 9, in canal trustees' subdiv. of sec. 33, T. 39 N., R. 14 east.

Lots 19, 20, and 28, in block 2; lots 24, 34, 31, and 32, in block 1,

T. J. Foster's subdiv. of the part of block 10, canal trustees' subdiv. sec. 33, T. 39 N., R. 14 east.

Lots 1 and 37, in bl'k 1, and lots 1 and 37, in bl'k 2.

Guno's subdiv. of part block 10, canal trustees' subdiv. sec. 33, T. 39 N., R. 14 east; lot 47.

Canal trustees' subdiv. of sec. 33, T. 39 N., R. 14 E.; S. W. part 364.6 and 480 ft. of block 12.

Sutton's subdiv. of bl'k 28 of canal trustees' subdiv. S. 33, T. 39 N., R. 14 E.

Lots 5, 44, and 45, in block 2.

In assessor's div. of bl'k 11 of canal trustees' subdiv. sec. 33, T. 39 N., R. 14 E.

Lots 61 and 62, in block 11.

In the city of St. Joseph, State of Missouri:

In South St. Joseph Addition to said city.

Lots 1, 2, 3, 4, 5, 6, and 7, in block 56; lots 1, 2, 3, 4, 5, 6, and 7, in block 57; lots 5, 6, and 7, in block 58; lots 12, 13, and 14, in block 55.

63 In the city of St. Louis, State of Missouri:

In Scott's Addition to said city.

Lots 25, 26, 1, 2, 36, 33, and four feet and eight inches of lot 32 of block 6.

The court also finds and adjudges that the Wabash Company acquired title to the following lines of railroad, with all the franchises and property, real and personal, and all choses in action, rights, incomes, revenues, and credits pertaining thereto or used in connection therewith, by the use of the general mortgage bonds aforesaid, and that said lines, rights, property, and interests were purchased by said company with said general mortgage bonds, viz:

The Peoria, Pekin and Jacksonville railroad, hereinbefore described.

The Springfield and Northwestern railroad, hereinbefore described.

The Braidwood Branch, hereinbefore described.

It is adjudged that as to all property, rights, interest, and choses in action acquired by the Wabash Company after the execution of said general mortgage, whether described in the same or not (except such as are herein otherwise adjudged and such as pertain to railroads not herein declared to be subject to the general mortgage), the lien of said mortgage attached and is now in force.

It is, however, adjudged that the said general mortgage on the property of the Wabash Company did not attach to or become
64 a lien on the railroad or property of the Havana, Rantoul and Eastern Railroad Company.

The court finds that said mortgage was duly recorded as required by law, and for all the contents and provisions thereof and for the terms and provisions of the bonds secured thereby and the coupons attached thereto reference is hereby made to a true copy of said mortgage, filed by said Wabash Company with its original and

amended bills in this cause, marked Exhibit "B," and commencing on page 1 of volume 1 of the printed volume of exhibits.

The court further finds and adjudges that afterwards, on the first day of May, A. D. 1883, for the purpose of securing an intended issue of its bonds (called collateral trust bonds) amounting to ten millions of dollars, said Wabash Company executed and delivered to the Mercantile Trust Company of New York, as trustee, a certain other indenture called and known as "the collateral trust," and thereby assigned and transferred to said last-named company, for the purposes of said trust, all the bonds, stocks, cars, steamboats, rolling stock, and interest in real estate specified in said instrument, and then and there delivered all said bonds, stocks, and evidences of title to said trustee.

And for the terms and conditions of said collateral trust and of the bonds and coupons intended to be secured thereby reference is hereby made to a true copy thereof, filed by said Wabash Company with its original and amended bills herein, marked Exhibit "D," appearing in said printed volume 1 of exhibits, beginning on page 33.

65 The court finds and adjudges that at the time of the execution of the collateral trust the said Wabash Company transferred and delivered to the Mercantile Trust Company, trustee, under said instrument certain stocks, bonds, assignments, bills of sale, and other evidences of title to property, real and personal, pledged in and by said collateral trust, and that said stocks, bonds, assignments, bills of sale, and other evidences of title were as follows, this decree adopting the description given in said instrument and the preamble by which said description is introduced therein:

"Whereas the Wabash, St. Louis and Pacific Railway Company has deposited with the Mercantile Trust Company of New York assignments, bills of sale, or other evidences of title to the following-described bonds, shares, real estate, and other property, viz:

"$46,000 Union Bridge Company bonds;

"$1,342,000 Humeston and Shenandoah Railroad Company first-mortgage 7 per cent. bonds;

"$1,000,000 Wabash, St. Louis and Pacific Railway Company general mortgage six per cent. bonds;

"$400,000 Wabash Railway Company mortgage seven per cent. bonds of 1879;

"$199,000 Wabash, St. Louis and Pacific Railway Company, Detroit Division, six per cent. bonds;

"248,000 Quincy, Missouri and Pacific Railroad Company income bonds;

"$1,711,000 Toledo, Peoria and Western Railroad Company first preferred income bonds;

"$728,000 Toledo, Peoria and Western Railroad Company second-preferred income bonds;

66 "13,404 shares Toledo, Peoria and Western Railroad Company;

"10 shares St. Joseph Union Depot;

"210 shares Union Depot Company of Kansas City, Missouri;

"10 shares Hannibal Union Depot Company;
"5,187 shares Des Moines Northwestern Railway Company;
"2,214 shares Havana, Rantoul and Eastern Railroad Company;
"9,996 shares Des Moines and St. Louis Railroad Company;
"20,127 shares Humeston and Shenandoah Railroad Company;
"21,538.96 shares Missouri, Iowa and Nebraska Railway Company;
"9,000 shares St. Louis, Jerseyville and Springfield Railroad Company;
"2,030 shares Clarinda and St. Louis Railroad Company;
"14,246 shares Quincy, Missouri and Pacific Railroad Company;
"5,380 shares St. Louis, Ottumwa and Cedar Rapids Railway Company;
"11,089 shares Council Bluffs and St. Louis Railway Company;
"7,281 shares St. Louis, Council Bluffs and Omaha Railroad Company;
"4,332 shares Brunswick and Chillicothe Railroad Company;
"2,687 shares Centreville, Moravia and Albia Railroad Company;
67 "750 shares Attica, Covington and Southern Railway Company;
"1,665 shares American Refrigerator Transit Company of Illinois;
"60 shares Union Bridge Company of Toledo, Ohio;
"17 shares St. Louis County Railroad Company;
"4,994 shares Peoria and Pekin Union Railway Company;
"9,999 shares Chicago and Western Indiana Railroad Company;
"12,500 shares St. Louis Bridge Company, common stock;
"1,160 shares St. Louis and Mississippi Valley Transportation Company;
"Steamers now on Lake Erie known as the 'Russell Sage,' 'John C. Gault,' 'A. L. Hopkins,' and 'Morley;'
"15 locomotives, manufactured by the Rhode Island Locomotive Works;
"13 passenger cars, manufactured by Barney, Smith & Co.;
"5 baggage cars, manufactured by Barney, Smith & Co.;
"1,210 freight cars, manufactured by Barney, Smith & Co.;
"All the right, title, and interest of said party of the first part in and to certain rolling stock, being all the rolling stock mentioned and described in certain agreements between the party of the first part and the New York and Pacific Car Trust Association."

68 But the court finds that of the stock of the Des Moines Northwestern Railway Company the said Mercantile Trust Company now holds only 5,037 shares subject to said mortgage.

The said collateral trust also embraced and attached to certain real estate therein referred to, situate in the county of Cook and State of Illinois, held in trust for said Wabash Company by Solon Humphreys, and which the court finds was conveyed to said Solon Humphreys alone in trust for said Wabash Company. Said real estate is more particularly described as follows:

The whole of lots 1 and 2, in block 9.
The whole of lots 3 and 4, in block 9.

The whole of lots 5 and 6, in block 9.

All in Springer and Fox Addition to the city of Chicago, in Cook county, State of Illinois.

Also assessors' division of the N. W. ¼ and W. ½ N. E. ¼ section 32, town. 39 N., range 14 east, all lying east of the South Branch of the Chicago river, of latitude 32, and all being in the county of Cook aforesaid.

It is further found and adjudged by the court that of the general mortgage bonds intended to be issued as aforesaid there were in fact issued and are now outstanding and unpaid a number thereof, the principal of which amounts to seventeen million dollars, and that there is due for interest thereon and upon coupons attached thereto since the latter matured the further sum of two millions one hundred and thirty-two thousand seven hundred and fifty-three dollars and forty cents up to December 1, 1885, of which
69 number sixteen millions of dollars were sold for value, and the remaining one million were hypothecated to the Mercantile Trust Company of New York, as trustee, in the collateral trust mortgage, and now held subject to said trust; and reference is hereby made to the report of the special master to whom was referred the matter of taking proof as to the number and amount of said bonds now outstanding, the amount of principal and interest due thereon, and the names of the parties owning and holding the same as far as now known.

The court further finds that the Wabash Company on the first day of June, A. D. 1884, made default in the payment of all the interest which became due on said bonds on said day, and that such default has continued ever since that time; that said company also made default in the payment of all installments of interest maturing on said bonds since said first day of June, A. D. 1884, and that all such defaults have continued ever since.

The court finds further that demand was duly made by the holders of a large number of said bonds and coupons at the office of said Wabash Company, in the city of New York, for the payment of the interest maturing thereon on the first day of June, A. D. 1884, such demand being made on or after said day, and payment was then and there refused.

That in the month of December, 1885, after the said default had continued for more than six months after the maturity of said coupons on the first day of June, 1884, and the demand made for the payment thereof as aforesaid, the holders of more than a ma-
70 jority in value of all the general mortgage bonds then outstanding and secured by said general mortgage determined that they required the principal of all said bonds then outstanding to become at once due and payable, and so notified the trustees named in said mortgage, and also gave notice in writing to said trustees of their having so determined, and thereby required said trustees to exercise the powers conferred on them by said mortgage to enforce the payment of the indebtedness and to proceed to foreclose the said mortgage by judicial decree.

It is therefore adjudged and decreed by the court that the prin-

cipal sums specified in the general mortgage bonds aforesaid, as well as the interest thereon, have now become due and payable according to the terms and conditions of said instrument.

The court, being fully advised, also finds and adjudges that of the collateral trust bonds aforesaid there were issued and either sold for value or so pledged as to entitle the parties holding the same to the proceeds thereof and the security created therefor as aforesaid the whole amount of ten millions of dollars of principal; that there is due thereon to Dec. 1, 1885, the additional sum of $1,109,268.80 as interest on said bonds and on coupons attached thereto since the maturing of such coupons.

That the Wabash Company made default in the payment of interest maturing on said collateral trust bonds on the first day of May, A. D. 1884, and on each installment of interest maturing since that time; that demand was duly made for the payment of in-
71 terest maturing as aforesaid on the first day of May, A. D. 1884, at the office of the Wabash Company, in the city of New York, by the holders of a large number of said bonds and coupons, such demand being made on and after said first day of May, 1884; that after said default had been so made and after the demand aforesaid the holders of more than twenty-five per cent. of all said collateral bonds then outstanding, in writing, requested the Mercantile Trust Company aforesaid to proceed under the power contained in said indenture to sell all or a sufficient amount of the securities in said collateral trust mentioned to produce a sum sufficient to pay all the principal and interest of said entire issue of said bonds; that due notice of such request and of the purpose of said trustee to comply therewith was given to the Wabash Railway Company more than sixty days before said Mercantile Trust Company filed its cross-bill herein; but that all said property embraced in said collateral trust being under the control of this court, said trustee did not exercise its power of sale, but filed its cross-bill for the foreclosure of said instrument as a mortgage. The court therefore adjudges and decrees that the holders of said collateral trust bonds are now entitled to have the property embraced in said collateral trust sold and the proceeds applied to the payment of both the principal and interest of said bonds.

And for the number of said collateral trust bonds now outstanding and the names of the persons owning or holding the same reference is hereby made to the report of the master to whom said matter was referred by order of court.

72 The court further adjudges that upon the execution and recording of the general mortgage aforesaid the same became and was and still is a lien on the lines of railroad, franchises, interests, and property described in said mortgage as having been conveyed to said trustees at the time of the execution thereof, and that the said mortgage also became a lien on all the right, title, and interest of the Wabash Company in and to all such other lines of railroad, with all their property, rights, and franchises, as are described in said mortgage as being then in course of amalgamation with the property of said Wabash Company. The said last-

mentioned lien attached to each of said lines of railroad, with the franchises and property thereof, to the extent of the interest and title of the Wabash Company therein, whether acquired at the time of the execution of the said mortgage or after that time.

The court also adjudges, as aforesaid, that the Wabash Company before or after the execution of said general mortgage, by lease, consolidation, purchase, or contract, acquired title to or interests in certain other lines of railroad, franchises, or property not specifically described in said general mortgage, but hereinbefore referred to; that the lien of said general mortgage under the terms and provisions thereof attached to all of said railroads, franchises, property, rights, choses in action, and interests to the extent of the title and interest of the Wabash Company therein; but the court adjudges that the lien so created on any line of railroad, franchises, interests, or property acquired by the Wabash Company after the execution of said general mortgage was and is subject to any lien prior or subsequent thereto created to secure the purchase-money
73 of said railroad, franchise, property, or interest or to secure the performance of any condition on which said Wabash Company acquired the same.

It is further adjudged that at the time of the execution of said collateral trust and the delivery of the stocks, bonds, assignments, bills of sale, and other evidence of title to the property embraced therein by the Wabash Company to the Mercantile Trust Company, as trustee, said instrument became a lien on all the right, title, and interest of said Wabash Company in and to all the property, rights, and interests embraced in said collateral trust in favor of all owners and holders of said bonds, and that said lien is still in force.

It is further ordered and adjudged that this decree or any sale made thereunder shall not in any way prejudice or affect the rights of parties to or persons interested in certain mortgages, deeds of trust, leases, and contracts hereinafter set forth, but all the rights of such persons and parties are hereby reserved to them. The deeds of trust, mortgages, leases, and contracts in regard to which such reservation is made are as follows:

A mortgage or deed of trust to secure the principal and interest of bonds amounting to $900,000, with interest thereon at the rate of 7 per cent. per annum, executed by the Toledo and Illinois Railroad Company to the Farmers' Loan and Trust Company, as trustee. Said mortgage became a lien on that portion of said railroad extending from Toledo, Ohio, to the Indiana State line, a distance of 75.5 miles.
The said interest was paid up to August 1st, 1884, except that
74 represented by certain coupons funded under an agreement made in 1877.

A mortgage, dated August 1st, 1853, executed by the Lake Erie, Wabash, and St. Louis Railroad Company to the Farmers' Loan and Trust Company, as trustee, to secure bonds amounting to $2,500,000, with interest at the rate of 7 per cent. per annum. Said mortgage became a lien on that portion of the railroad of the Wabash, St. Louis, and Pacific Railway Company extending from the western boundary of the State of Ohio at the western terminus of the Toledo

and Illinois railroad to the eastern boundary of Illinois, a distance of 166.1 miles.

A deed of trust, dated October 15, 1858, executed by the Toledo and Wabash Railroad Company to Edwin D. Morgan, as trustee, to secure bonds amounting to $1,000,000, with interest thereon at the rate of 7 per cent. per annum. Said deed of trust became a lien on that portion of said railroad extending from Toledo, Ohio, to the eastern boundary of the State of Indiana, all lying within the State of Ohio.

A deed of trust, dated October 15, 1858, executed by the Wabash and Western Railway Company to Edwin D. Morgan, as trustee, to secure the payment of bonds amounting to $1,500,000, with interest thereon at 7 per cent. per annum. Said deed of trust became a lien on all the said line of railroad in the State of Indiana ex-
75 tending from the west line of the State of Ohio to the east line of the State of Illinois, a distance of 166.1 lines.

A deed of trust, dated May 25, A. D. 1863, executed by the Great Western Railroad Company of 1859 to George Griswold, Alexander M. White, and Henry Worden, as trustees, to secure bonds amounting to $2,496,000, with interest thereon at the rate of 7 per cent. per annum; that said mortgage became a lien on all said lines of railroad extending from Meredosia and Naples, in the State of Illinois, to the eastern boundary of Illinois, being 180.7 miles in length.

A deed of trust, dated May 11, A. D. 1865, executed by the Great Western Railway Company of 1859 to Solon Humphreys and James R. Jessup to secure bonds amounting to $2,500,000, with interest thereon at the rate of seven per cent. per annum; which said deed of trust became a lien on all that portion of railroad last above described.

A deed of trust, dated March 1st, 1862, executed by the Illinois and Southern Iowa Railroad Company to John N. A. Griswold, James R. Jessup, and Lucien Tilton, as trustees, which became a lien on all that portion of the railroad aforesaid extending from Carthage, Illinois, to Clayton, Illinois, a distance of 29.1 miles, said mortgage being executed to secure bonds amounting to $300,000,
76 with interest at six per cent. per annum, said interest being paid up to August 1st, 1884, except coupons funded as aforesaid.

A deed of trust, dated May 29, 1865, executed by the Quincy and Toledo Railroad Company to John T. Terry, as trustee, to secure the payment of bonds amounting to $500,000, with interest at seven per cent. per annum, which deed became a lien on all that portion of railroad extending from the west bank of the Illinois river opposite Meredosia to Camp Point and Clayton, in the State of Illinois, a distance of 33.6 miles.

A deed of trust, dated the 1st day of February, A. D. 1867, executed by the Toledo, Wabash and Western Railway Company to Isaac H. Knox and James R. Jessup, as trustees, to secure an intended issue of bonds amounting to $15,000,000, with interest at seven per cent. per annum thereon; that of the bonds so intended to be secured by said trust deed only $2,610,000 are now outstanding.

Said deed of trust became a lien on all said railroad extending from Toledo, Ohio, to Meredosia and Naples, Illinois, and from Meredosia to Camp Point, Illinois, and also from Clayton, Illinois, to the east bank of the Mississippi river at Hamilton, Illinois; also on all property afterwards acquired by said Toledo, Wabash and Western Railway Company which might be used in connection with said railroad, and all property that said company might acquire in the city of Quincy, Illinois, and also all interests of said
77 company for traffic purposes with the Chicago, Burlington and Quincy Railroad Company.

A deed of trust, dated June 2d, A. D. 1869, executed by the Decatur and East St. Louis Railroad Company to Isaac H. Knox, as trustee, to secure the payment of bonds amounting to $2,700,000, with interest at seven per cent. per annum thereon. Said mortgage became a lien on all said railroad extending from Decatur, Illinois, to East St. Louis, Illinois.

A deed of trust, dated May 17, 1879, executed by the Wabash Railway Company to Solon Humphreys and Daniel A. Lindley, as trustees, to secure the payment of bonds amounting to $2,000,000, with interest at the rate of seven per cent. per annum, which deed of trust became a lien, subject to other prior liens, on the following lines of railroad, with all their franchises, property, issues, rents, and profits: All the railroad of said Wabash Railway Company extending from the city of Toledo, Ohio, through the State of Indiana and thence into the State of Illinois to Meredosia, with branch of said road to Naples and East Hannibal and from Meredosia to Camp Point, in the State of Illinois, and with branch of said road from Clayton to the east bank of the Mississippi river at Hamilton, in said State, and with branch of said road leading from Decatur to East St. Louis, in the same State. Said interest was paid up to October 1st, 1884.

A deed of trust, dated May 16, 1879, executed by the Wabash Railway Company to Alfred T. White, as trustee, to secure the
78 payment of bonds amounting to $500,000, with interest at seven per cent. per annum. Said deed of trust became a first lien on all of said railroad extending from Naples, Illinois, to East Hannibal, Illinois, and was given to secure the purchase-money of said property.

A deed of trust, dated March 9, 1865, executed by the North Missouri Railroad Company to Edwin D. Morgan and Louis H. Meyer, as trustees, to secure the payment of bonds amounting to $6,000,000, with interest thereon at the rate of 7 per cent. per annum. Said deed of trust became a lien on all that portion of the railroad of the Wabash Company extending from St. Louis, Missouri, to Coatsville, Missouri, and from Moberly, Missouri, to North Missouri Junction, about eight miles from Kansas City, Missouri. The railroad embraced in said deed of trust is about 354.1 miles in length.

A deed of trust, dated August 12, A. D. 1874, executed by the St. Louis, Kansas City and Northern Railway Company to the Farmers' Loan and Trust Company of the City of New York, as trustee, to secure the payment of bonds amounting to $3,000,000, with interest

thereon at 7 per cent. per annum. Said mortgage became a lien on all the railroad of the St. Louis, Kansas City and Northern Railway Company in the State of Missouri, being 353 miles in length, as then constructed, from North Market street, in the city of St. Louis, to the southern boundary line of the State of Iowa, and from Mob-
79 erly, Missouri, to North Missouri Junction, in Clay county, Missouri, and as the same might be thereafter constructed through Clay county, a distance of about eight miles, to the bridge across the Missouri river at Kansas City, in Jackson county, Missouri.

Also as the same might then or thereafter be located in or through the county of St. Louis, to connect with the Union depot in said city; also as the same might then or thereafter be located south of North Market street, in said city of St. Louis, together with all real estate, right of way, shops, rolling stock, depots, appurtenances, property, and franchises of said company.

Also certain blocks and lots of land, structures, and buildings described in said mortgage, a copy of which is marked Sub-Exhibit "F" No. 14, and is filed with the amended bill of the Wabash, St. Louis and Pacific Railway Company, consolidated in this cause.

A mortgage, dated October 1st, A. D. 1878, executed by the St. Louis, Kansas City and Northern Railway Company to Henry F. Vail and Charles Parsons, as trustees, to secure the payment of bonds amounting to $1,000,000, with interest at 6 per cent. per annum, which interest has been paid to October 1st, 1885, which said mortgage became a lien on all the bridge of said last-named company and all franchises thereof, and all the real estate, approaches, and appurtenances thereof, situated in the county of St. Louis, on the south side of the Missouri river, and in the county of St. Charles, on the north side of said river, in the State of Missouri.

80 A deed of trust executed by the St. Louis, Kansas City and Northern Railway Company on the 9th day of July, A. D. 1878, to Solon Humphreys and George A. Leighton, as trustees, to secure the payment of bonds amounting to $388,500, with interest at the rate of 7 per cent. per annum, which interest has been paid up to October 1st, 1885. Said deed of trust became a second lien on all the bridge franchises and property last above described.

A deed of trust, dated February 15th, A. D. 1879, executed by the St. Louis, Kansas City and Northern Railway Company to the United States Trust Company of New York, as trustee, to secure the payment of bonds amounting to $2,350,000, with interest thereon at the rate of 7 per cent. per annum; that said deed of trust became a lien on a line of railroad purchased by said last-named company from the Council Bluffs and St. Louis Railroad Company, a corporation of the State of Missouri, extending from Elm Flats, in Daviess county, Missouri, in a northwesterly direction through the counties of Daviess, Gentry, Nodaway, and Atchison, in said State, to the boundary lines between the States of Missouri and Iowa, a distance of 78 miles, and said deed of trust also became a lien on the leasehold interest of said St. Louis, Kansas City and Northern Railway Company in and to a certain other line of railroad extending from

Council Bluffs, in the State of Iowa, in a southeasterly direction through the counties of Pottawattamie, Mills, Fremont, and Page, in said State, to the boundary line between the States of Iowa and Missouri, a distance of 65 miles, said last-mentioned railroad
81 having been leased by said St. Louis, Kansas City and Northern Railway Company from the Council Bluffs and St. Louis Railway Company, a corporation of the State of Iowa, as said railroad was then or might thereafter be constructed, together with all franchises, rights, and other appurtenances thereto belonging.

A guaranty mortgage, dated February 15th, A. D. 1879, executed by the Council Bluffs and St. Louis Railway Company to the United States Trust Company of New York, intended to farther secure the principal and interest of the issue of bonds last before mentioned. Said mortgage became a lien on all the right, title, and interest of said Council Bluffs and St. Louis Railway Company in and to the line of railroad last aforesaid, commencing at Council Bluffs, Iowa, and extending to the boundary line between the States of Iowa and Missouri, with all the rights, franchises, and property of mortgagor company therein, as then or thereafter constructed.

A deed of trust, dated July 15, 1879, executed by the St. Louis, Kansas City and Northern Railway Company to George I. Seney, of New York, to secure bonds amounting to $264,000, with interest thereon at the rate of 6 per cent. per annum. Said trust deed became a lien on all that part of said railroad extending from Roseberry, Missouri, to the State line between the States of Missouri and Iowa, being 10.1 miles in length; and also upon all the right, title, and interest of said grantor company in and to that portion of railroad between said State line and Clarinda, Iowa, a distance
82 of 11.4 miles, which said grantor company acquired from the Clarinda and St. Louis Railroad Company of Iowa.

A guaranty trust deed, dated July 15, 1879, executed by the Clarinda and St. Louis Railroad Company to George I. Seney, as trustee, to secure the payment of bonds amounting to $264,000, with interest at 6 per cent. per annum, being the bonds last aforesaid, which deed of trust became a lien on all the right, title, and interest of said last-mentioned company in the railroad commencing at the town of Clarinda, in the State of Iowa, and extending in a southerly direction through the county of Page, in the State of Iowa, to the boundary line between the States of Iowa and Missouri.

A deed of trust, dated July 1st, 1879, executed by the Champaign, Havana and Western Railroad Company to Henry W. Ford and Richard S. Brock, as trustees, intended to secure the payment of bonds amounting to the sum of $1,450,000, of which $340,900 are now outstanding, with interest thereon at the rate of 7 per cent. per annum, which deed of trust became a lien on the railroad, property, and franchises of said grantor company extending from the city of Champaign, in the county of Champaign, in the State of Illinois, running thence by way of White Heath, Clinton, Lincoln, and Mason City to Havana near the east bank of the Illinois river, with a branch extending from White Heath to Decatur, all said points

being in the State of Illinois, and said railroad and branch being of the aggregate length of 131 miles.

A deed of trust, dated on the first day of December, A. D.
83 1880, executed by the Wabash, St. Louis and Pacific Railway Company to Henry F. Spaulding and John T. Terry, as trustees, intended to secure the payment of bonds amounting to $1,600,000, with interest thereon at the rate of 6 per cent. per annum, of which bonds so intended to be secured only $1,200,000 were ever issued. Said deed of trust became a lien on the railroad and franchises last above described, and said bonds were issued for the purposes of being exchanged for the bonds last above described.

A deed of trust, dated February 6th, 1880, executed by the Centreville, Moravia and Albia Railroad Company to the Farmers' Loan and Trust Company, as trustee, to secure bonds amounting to $400,000, with interest thereon at six per cent. per annum, which deed of trust became a lien on the railroad and franchises of the last-named railroad company projected to extend from a junction with the railroads of the Missouri, Iowa and Nebraska Railroad Company in the vicinity of Centreville, Appanoose county, Iowa, to a junction with the railroad of the Central Iowa Railway Company in the vicinity of Albia, Monroe county, Iowa, being about twenty-four miles in length.

A deed of trust, dated March 1st, 1881, executed by the Missouri, Iowa and Nebraska Railway Company to the Mercantile Trust Company of New York, as trustee, to secure the payment of bonds amounting to $2,269,000, with interest thereon at the rate of six per cent. per annum, and which deed of trust became a lien upon the railroad, franchises, and property of said last-named company extending from Keokuk, Lee county, Iowa, to the south line of said
84 county and State; thence through the counties of Clark, Scotland, and Schuyler, in the State of Missouri, to the north line of said State; thence through the counties of Appanoose, Wayne, and Decatur to Van Wert, Iowa, said line being about 143½ miles in length.

That said deed of trust by its terms referred to a certain prior deed of trust, dated June 1st, 1870, executed by the Missouri, Iowa and Nebraska Railway Company to the Farmers' Loan and Trust Company, as trustee, to secure an issue of bonds amounting to $3,025,000, with interest, and being a lien on the same property, in whole or in part. The said deed of trust of March 1st, 1881, and the deed of trust of June 1st, 1870, are to be taken together as representing substantially the same debt, and are to be taken together with any judgment or decree rendered by any competent court upon any of the bonds thereby secured.

A deed of trust, dated May 22, 1880, executed by the Toledo, Peoria and Western Railroad Company to Philip Henry Brown, Robert C. Martin, and John Paton, as trustees, to secure the payment of an issue of bonds amounting to $4,500,000, with interest thereon at seven per cent. per annum. Said deed became a lien on the railroad, franchises, and property of said last-named company extending from a point at the eastern boundary of the State of Illinois where

it connects with the Toledo, Logansport and Burlington railway and extending westwardly to the western boundary of the State of Illinois, in the city of Warsaw, and in the town of Hamilton, Illinois, on the Mississippi river, and also from La Harpe to Burlington, Iowa, in the State of Iowa. The said company was a corpo-
85 ration of the State of Illinois and not of Missouri, as by mistake stated in the amended bill of the Wabash Company. This court does not by this decree determine whether said last-mentioned deed of trust did or did not become a lien on any property in the city of Burlington, Iowa.

A deed of trust, dated May 22, 1880, executed by said Toledo, Peoria and Western Railroad Company to Charles E. Whitehead, J. P. Giraud Foster and William Hill, as trustees, to secure issues of income bonds aggregating to $3,900,000, with interest at the rate of 4 per cent. per annum, which deed of trust became a lien on all the railroad, franchises, and property last above described, but subject to the lien of the trust deed last above described.

A deed of trust, dated July 1, 1880, executed by said Wabash Railway Company to Henry F. Spaulding and John T. Terry, as trustees, to secure bonds amounting to $4,500,000, with interest at 5 per cent. per annum; that said trust deed became a lien on the railroad, franchises, and property extending from Effingham, in the county of Effingham, Illinois, by way of Strawn, in Livingston county, in said State, to Streator, in the county of La Salle, with a branch to Altamont, Illinois, being the railroad formerly known as the Chicago and Paducah railroad, and also upon the railroad formerly known as the Chicago and Strawn railway, extending from Strawn aforesaid to or near Chicago, Illinois. Said bonds so secured were issued for the purchase-money of the railroad, franchises, and property described therein.

A deed of trust, dated May 31, 1881, executed by the Humes-
86 ton and Shenandoah Railroad Company to W. J. Ladd and John T. Terry, as trustees, to secure bonds amounting to $2,684,000, with interest at the rate of 7 per cent. Said mortgage became a lien on the railroad, franchises, and property of said last-named company extending from a point at Humeston, Iowa, 100 feet west of where the Chicago, Burlington and Quincy railroad crosses the Missouri, Iowa and Nebraska railroad, thence west to Shenandoah, Iowa, about 112 miles, with all its property and franchises.

A deed of trust, dated February 28, 1881, executed by the Des Moines Northwestern Railway Company to the Central Trust Company of New York and James Cheney, as trustees, for the purpose of further securing a portion of the bonds issued by the said Wabash Company and secured by its general mortgage aforesaid. Said deed of trust became a lien on all the railroad, property, and franchises of said grantor company extending from Des Moines, in the State of Iowa, to Fonda, in said State, a distance of 114.9 miles, said railroad being a narrow-gauge road; also that the bonds secured by said deed of trust were so issued for the uses and purposes therein defined, and all rights, as between the Des Moines Northwestern

Railway Company and any party to this cause or the receivers herein, arising from said mortgage or the lease of the railroad of said company to the Wabash Company or the contract under which they were made are hereby expressly reserved from the operation of this decree, and shall be hereafter enforced only in some court having jurisdiction of the property covered by said lease and mortgage.

And any claim that the receivers herein may set up against said Des Moines Northwestern Railway Company or the property
87 thereof shall be litigated in some court having jurisdiction of said railroad, and any claim of said railroad company against said receivers or the property in their possession may be litigated in the circuit court of the United States for the southern district of Iowa, eastern division.

A deed of trust, dated February 17, 1881, executed by the Attica, Covington and Southern Railway Company of Indiana to the Central Trust Company of New York and James Cheny, as trustees, to further secure a portion of the general mortgage bonds of the Wabash Company secured by the general mortgage aforesaid; that said deed of trust became a lien on the railroad, property, and franchises of said Attica, Covington and Southern Railway Company of Indiana, extending from Attica, Fountain county, Indiana, to Covington, in said county, a distance of 14.5 miles, and the bonds thereby secured were equal to ten thousand dollars for each mile of said road.

A deed of trust, dated October 1, 1881, executed by the Wabash, St. Louis and Pacific Railway Company to the Mercantile Trust Company of New York, as trustee, to secure bonds amounting to $3,857,000, with interest at the rate of five per cent. per annum. Said deed of trust became a lien on the Cairo Division of the Wabash, St. Louis and Pacific Railway Company, extending from Danville, Illinois, to St. Francisville, in said State, and from Vincennes, Indiana, by way of St. Francisville to Cairo, Illinois, with all the property thereof. Said bonds were issued in payment of the purchase-money of said railroad and property.

A deed of trust, dated April 1, 1879, executed by the St. Louis Bridge Company to J. C. Rogers and C. E. Tracy, as trustees, to secure an issue of bonds amounting to $5,000,000, with interest thereon at the rate of seven per cent. per annum, which deed
88 of trust became a lien on the property of said St. Louis Bridge Company, as therein described.

A deed of trust, dated November 3d, 1881, executed by the said Wabash Company to the Mercantile Trust Company of New York and James Cheney, as trustees, to secure bonds amounting to about $2,052,000, with interest thereon at six per cent. per annum; that said deed of trust became a lien on that portion of the railroad of the Wabash Company, formerly known as the Detroit, Butler and St. Louis railroad, extending from a point on the Detroit, Grand Haven & Milwaukee railroad in or at Detroit, Michigan, where the said Detroit, Butler and St. Louis railroad intersects it, and running thence in a southwesterly direction through the counties of Wayne,

Washtenaw, Monroe, and Lenawee, in Michigan, and the counties of Fulton and Williams, in Ohio, and the county of De Kalb, in Indiana, to Butler, in said State, being about 114 miles in length, with all the property and franchises pertaining to said railroad and all property then in possession or which might be thereafter acquired for the convenience of said railroad and its business; that said trust deed was also given to remove all doubts as to the validity of a prior trust deed between the same parties, and was given to secure the purchase-money of said railroad and property.

A deed of trust, dated February 1st, 1881, executed by the Peoria and Pekin Union Railway Company to the Central Trust Company of New York, as trustee, to secure bonds amounting to $1,500,000, with interest at the rate of six per cent. per annum. Said deed of trust became a lien on the property and franchises of said Peoria and Pekin Union Railway Company; also a second mort-
89 gage executed by said last-named company to the Central Trust Company of New York, as trustee, dated February 1st, 1881, to secure an issue of income bonds amounting to $1,500,000, with interest not exceeding six per cent. per annum; that said deed of trust became a lien on all said property last aforesaid, subject to the superior lien of said prior mortgage or trust deed.

A deed of trust, dated January 1st, 1867, executed by the Chicago, Cincinnati and Louisville Railroad Company to George T. M. Davis, as trustee, to secure bonds amounting to $1,000,000, with interest at the rate of seven per cent. per annum. Said deed of trust became a lien on all the railroad, franchises, and property of said last-named company, extending from Peru, Indiana, to La Porte, Indiana, a distance of 71.51 miles, such lien operating on said line whether then or thereafter constructed.

A deed of trust, dated June 1st, 1871, executed by the Indianapolis, Peru and Chicago Railway Company to Clifford A. Hand, as trustee, to secure bonds amounting to $275,000, with interest thereon at the rate of seven per cent. per annum. The said deed of trust became a lien on the railroad, property, and franchises of said last-named company, extending from Indianapolis, in the county of Marion, Indiana, through the counties of Hamilton, Tipton, and Howard, to the city of Peru, in the county of Miami, Indiana, a distance of seventy-five miles.

A certain other second deed of trust, dated June 1st, 1881, executed by said last-named railroad company to Wager Swayne and
90 Abram W. Hendricks, as trustees, to secure an intended issue of bonds not to exceed $2,275,000, of which only $2,000,000 were ever issued, with interest thereon at the rate of six per cent. per annum. Said deed of trust became a lien on the railroad, franchises, and property of said last-named company, being the railroad and property last described.

A deed of trust, dated June 1st, 1881, executed by the Michigan City and Indianapolis Railroad Company to Abraham W. Hendricks and Wager Swayne, as trustees. Said deed of trust became a lien on the railroad, franchises, and property of said last-named railroad company, extending from Michigan City, in the county of

La Porte, Indiana, to La Porte, in the same county, a distance of 12.75 miles. The said trust deed and the two trust deeds last before described are to be taken together as explaining each other.

A deed of trust, dated November 4, 1881, executed by the St. Louis, Jerseyville and Springfield Railroad Company to the Central Trust Company of New York and James Cheney, of Indiana, as trustees, to secure a portion of the said general mortgage bonds of the Wabash Company amounting to $15,000 for each mile of railroad embraced therein. Said deed of trust became a lien on the railroad, franchises, and property of the said St. Louis, Jerseyville and Springfield Railroad Company, extending from a point on the railroad of said Wabash Company at or near New Berlin or between New Berlin and Springfield, in Sangamon county, Illinois, to its terminus at Grafton or Jersey Landing, in Jersey county, Illinois, a distance of 71.4 miles, and that said bonds were issued to
91 secure the performance of the condition on which the Wabash Company acquired said railroad and property.

A deed of trust, dated December 1st, 1881, executed by the Des Moines and St. Louis Railroad Company to the Central Trust Company of New York and James Cheney, as trustees. Said deed of trust was given to further secure a portion of the aforesaid general mortgage bonds of the Wabash Company, amounting to $15,000 per mile for each mile of the railroad hereinafter described. Said deed of trust became a lien on the railroad branches and property of said grantor company, extending from Albia, Iowa, to Des Moines, Iowa, a distance of 67.3 miles, and was given to secure the performance of the condition on which said Wabash Company acquired said railroad and property.

A deed of trust, dated March 1st, 1881, executed by the Champaign and Southeastern Railway Company to the Central Trust Company of New York and James Cheney, as trustees, to further secure a portion of the general mortgage bonds of the Wabash Company, amounting to $15,000 for each mile of the railroad hereinafter described. Said trust deed became a lien on the railroad, franchises, and property of said grantor company, extending from Champaign, Illinois, to Sidney, Illinois, a distance of 11.6 miles, and was given to secure the conditions on which said railroad and property was acquired by said Wabash Company.

A deed of trust, executed September 1st, 1880, by the Wabash, St. Louis and Pacific Railway Company to J. P. Giraud Foster
92 and Edward K. Goodnow, as trustees, to secure the payment of seventy-three promissory notes for the sum of one thousand dollars each, with interest at the rate of six per cent. per annum. Said deed of trust was given to secure the purchase-money of the property described therein, and became a lien on lots 13, 13 A, 14, 15, 15 A, 16, 17, 18, 19, 20, 21, 22, 23, and 24, all in the original plot of the city of Burlington, in the county of Des Moines, Iowa, and upon all the railroad iron therein, and on all improvements and appurtenances thereof and all rents, issues, and profits thereof. The court further adjudges that four of said notes have been paid and satisfied, and further adjudges that the said deed of trust is a lien

upon the property therein described superior to and free and clear of any lien or charges for the payment or contribution to the payment of any claims or demands whatever chargeable against such property herein.

A deed of trust, dated May 1st, 1873, made by the Boone County and Booneville Railway Company to J. M. Worden and R. A. Betts, as trustees, to secure bonds amounting to $100,000, with interest at 7 per cent. per annum. Said trust deed became a lien on a railroad extending from Columbia, Missouri, to Centralia, Missouri, a distance of about 21 miles.

A deed of trust, dated 1st October, 1875, made by the St. Louis, Ottumwa and Cedar Rapids Railway Company to Solon Humphreys and George S. Coe, as trustees, to secure bonds amounting to $322,500, with interest at the rate of 7 per cent. per annum. Said deed of trust became a lien on a line of railroad extending from
93 Ottumwa, Iowa, to its intersection with the St. Louis, Kansas City and Northern railway at the Missouri State line.

A deed of trust, dated August 1st, 1878, executed by the Brunswick & Chillicothe Railroad Company to George M. Rice, J. Kimball, and E. P. Burnham, as trustees, to secure bonds amounting to $304,500, with interest at the rate of 6 per cent. per annum; said deed of trust became a lien on the railroad of said grantor company from its intersection with the St. Louis, Kansas City and Northern railway at Brunswick, Missouri, to Chillicothe, Livingston county, Missouri, a distance of about 36 miles.

A deed of trust, dated September 14, 1872, executed by the St. Louis, Council Bluffs and Omaha Railroad Company to James B. Eads and J. A. Jamison, as trustees, to secure bonds to the amount of $626,000, with interest at the rate of 6 per cent. per annum; said trust deed became a lien on the line of railroad extending from Chillicothe, Missouri, to a point at or near Pattonsburg, Daviess county, Missouri, being about 43 miles in length.

A deed of trust, dated October 1st, 1879, executed by the Quincy, Missouri and Pacific Railroad Company to Solon Humphreys and Orville H. Browning to secure bonds amounting to $1,204,000, with interest at the rate of 6 per cent. per annum; said deed of trust became a lien on the line of railroad extending from a point in Missouri opposite the city of Quincy, Illinois, to Trenton, Missouri, a distance of about 134 miles.

A deed of trust, dated October 1st, 1879, executed by the
94 Quincy, Missouri and Pacific Railroad Company to Amos Green and Charles H. Bull, as trustees, to secure income bonds to an amount not exceeding $2,000,000, with interest thereon at the rate of 6 per cent. per annum, if earned; said deed became a lien on the line of railroad last above described.

A lease made by Eel River Railroad Company to the Wabash Company, dated August 26, 1879, of a railroad extending from Butler, Indiana, to Logansport, Indiana, on which rent was paid to June 1st, 1884.

A lease of the Quincy, Missouri and Pacific railway by Wabash Company, August 21, 1879; said railroad intended to extend from

West Quincy, Missouri, to some point on the Missouri river, but never constructed west of Trenton, Missouri, said rent being paid to January 1st, 1884.

A lease of the St. Joseph and St. Louis railroad, dated June 1st, 1874, to St. Louis, Kansas City and Northern Railway Company, said road extending from St. Joseph, Missouri, to North Lexington, in said State, the said rent being paid to March 1st, 1884.

A lease of the Boone County and Boonville railroad to the St. Louis, Kansas City and Northern Railway Company, dated May 1st, 1873; said railroad extends from Centralia, Missouri, to Columbia, Missouri, and said rental was paid to May 1st, 1885.

A lease of the St. Louis, Ottumwa and Cedar Rapids railway to the St. Louis, Kansas City and Northern Railway Company, dated October 1st, 1875; said railroad extends from Coatsville, Missouri, to Ottumwa, Iowa, and said rent was paid to October 1st, 1884.

95 A lease of the St. Louis, Council Bluffs and Omaha railroad to the St. Louis, Kansas City and Northern Railroad Company, executed June 20th, 1878; said railroad extends from Chillicothe, Missouri, to Pattonsburg, Missouri, said rent being paid to January 1st, 1885.

A lease of the Brunswick and Chillicothe railroad to the St. Louis, Kansas City and Northern Railway Company, dated August 1st, 1878; said railroad extends from Brunswick, Missouri, to Chillicothe, Missouri, and said rental is paid to August 1st, 1885.

A lease of the Council Bluffs and St. Louis railway (in Iowa) to St. Louis, Kansas City and Northern Railway Company, dated February 10, 1879; said railroad extends from Council Bluffs, Iowa, to the State line between Missouri and Iowa, and said rent was paid to October 1st, 1884.

A lease of the Clarinda and St. Louis railroad to the St. Louis, Kansas City and Northern Railway Company, dated July 15, 1879; said railroad extends from Clarinda, Iowa, to the State line between Iowa and Missouri; said rent is paid to August 1st, 1884.

Lease by the Chicago and Western Indiana Railroad Company to the Wabash Company, dated October 25th, 1879, and a supplemental lease or contract, dated November 1st, 1882, by the Chicago and Western Indiana Railroad Company to the Wabash Company, in which Anthony J. Thomas and Charles Edward Tracy are made parties of the third part as trustees.

A lease of the Centreville, Moravia & Albia railroad to the Missouri, Iowa and Nebraska Railway Company, dated February 6th, 1880; said railroad extends from Centreville, Iowa, to Albia, Iowa, and said rental is paid up to January 1st, 1884.

96 A lease of the Missouri, Iowa and Nebraska railroad to the Wabash Company, dated September 3d, 1880; said railroad runs from Keokuk, Iowa, to Van Wert, Iowa, and said rent is paid up to March 1st, 1884.

A lease of the Toledo, Peoria and Western railroad to the Wabash Company, dated May 22d, 1880; said railroad has been hereinbefore described; the said rent was paid to April 1st, 1884.

A lease of the Humeston and Shenandoah railroad to the Wabash

Company and Chicago, Burlington and Quincy Railroad Company, dated April 1st, 1881; said railroad has been hereinbefore described.

A lease of the Des Moines Northwestern railroad to the Wabash Company, dated February 28, 1881; said railroad has been hereinbefore described, and said rent has been paid to December 1st, 1883.

A lease of the Attica, Covington and Southern railroad to the Wabash Company, dated July 18th, 1881; said railroad has been hereinbefore described, and said rent was paid up to December 1st, 1883.

A lease of the St. Louis bridge and tunnel to the Wabash Company and Missouri Pacific Railway Company, dated July 1st, 1881; also includes other stipulations and provisions.

A lease of the Peoria and Pekin Union railroad to the Wabash Company and other companies, dated February 1st, 1881. This includes other stipulations and provisions. The property embraced in said instrument has been hereinbefore described.

97 A lease of the Indianapolis, Peru and Chicago railway to the Wabash Company, dated June 1st, 1881; said railroad has been hereinbefore described, and said rental has been paid up to December 1st, 1883.

A lease of the Indianapolis and Michigan City railroad to the Wabash Company, dated June 1st, 1881; said railroad has been hereinbefore described, and said rental has been paid up to December 1st, 1883.

A lease of the St. Louis, Jerseyville and Springfield railroad to the Wabash Company, dated November 22, 1880; said railroad has been hereinbefore described, and said rental was paid up to December 1st, 1883.

A lease of the Des Moines and St. Louis railroad to the Wabash Company, dated March 1st, 1882; said railroad has been hereinbefore described, and said rental has been paid up to December 1st, 1883.

A lease of the Champaign and Southeastern railway to the Wabash Company, dated March 1st, 1882; said railroad has been hereinbefore described, and said rental has been paid up to December, 1st, 1883.

A lease of the Hannibal bridge to the Wabash Company and the Missouri Pacific Railway Company, dated January 1st, 1883; said bridge and property has been hereinbefore described.

A contract between the St. Joseph Union Depot Company, the Wabash Railway Company, and other companies for the construction and use of a depot and terminal facilities in St. Joseph, Missouri, dated September 2d, 1880.

A like contract with the Kansas City Union Depot Company, dated June 1st, 1876, the St. Louis, Kansas City and Northern Railway Company being a party thereto before said Wabash Company was created.

98 A lease and contract between Detroit Union Railway Depot and Station Company and the Wabash Company for the use

of certain grounds by the last-named company and for certain privileges and advantages in said contract specified; said lease and contract is dated October 20, 1881, and a copy thereof is hereby referred to as Sub-Exhibit "F" 89, filed herein with the amended bill of the Wabash Company.

A contract for the construction and use of depot and grounds in Hannibal, Missouri, between the Hannibal Union Depot Company and Wabash Company, dated June 30, 1881, a copy of said contract being Sub-Exhibit "F" No. 90, filed with the amended bill of said Wabash Company in said cause.

A contract between the Hannibal and St. Joseph Railroad Company for the use by said last-named company of the bridge over the Missouri river at Kansas City, Missouri, dated June 1st, 1880, a copy of which is filed as Sub-Exhibit "F" No. 83 in the volumes of exhibits aforesaid.

It is adjudged by the court that the lien of the general mortgage on any leasehold interest or other conditional interest held or owned by the Wabash Company in or to any line or lines of railroad or any property, rights, or franchises shall not be held to impair the right of the lessor or lessees of such line or lines or the person or persons under whom the said line or lines were conditionally held by the Wabash Company to terminate any such lease or conditional interest because of any breach of the terms on which the same was granted to said Wabash Company. The declaration herein of a lien on such property in favor of said general mortgage shall not be held to revive
99 any leasehold or conditional title in said Wasbash Company in any instance when the same has been heretofore lawfully terminated or to prevent the future termination thereof for the breach of any condition for which such lease or interest might be otherwise lawfully terminated or forfeited, and in all cases when any line or lines of railroad have been, by order or decree of court, surrendered to the trustee or trustees in underlying and senior mortgages, or to any receiver or person appointed by the court in whose jurisdiction the property is situated, the said leases under which such line or lines were formerly held by said Wabash Company shall be and are hereby adjudged and decreed to be lawfully terminated.

The court further finds that since the filing of the original bill of complaint herein by the Wabash Company the holders of all the collateral trust bonds and the holders of a very large majority of the general mortgage bonds, desiring to avoid any controversy as to the priority of said instruments as creating liens on any of the property embraced in the collateral trust, and also to avoid all delay in effecting the foreclosure of said instruments and the sale of all said property, have entered into an agreement between themselves and have invited all the other holders of general mortgage bonds to become parties thereto.

And reference is hereby made to a copy of said agreement filed with the report of Edmund T. Allen, special master, to whom this cause was referred to take proof on specified issues; the said copy is hereby referred to with the same effect as if embodied herein.

100 By the terms of said agreement both instruments are to be foreclosed by judicial decree or decrees and all property embraced therein sold under such decree or decrees. A committee was by said agreement appointed — authorized to purchase all said property or any portion thereof for the benefit of all bondholders joining in said agreement or accepting the same. The property so to be purchased shall be conveyed to a corporation to be organized for that purpose, and that the owners of both classes of bonds shall be entitled to the securities of such new company on such terms as are in said agreement prescribed.

The court therefore adjudges and decrees that if the property embraced in the general mortgage and collateral trust respectively and the rights and interests declared to be comprised therein or subject thereto by the terms of this decree shall be sold under this decree, then all the holders of general mortgage bonds or collateral trust bonds who shall have signed or accepted said agreement, and all other of said bondholders who shall not within ninety days after the filing of this decree file in this court their written dissent from said agreement and their desire to litigate the question of priority of the liens of said general mortgage and collateral trust as to the property embraced in the latter instrument, shall be bound by the said agreement, and as to bondholders so bound the agreement aforesaid shall be held to settle and determine all such questions of priority and superiority.

101 In case any of the holders of general mortgage bonds shall not sign or accept said agreement, and shall, within the time limited as aforesaid, file in this court their dissent therefrom and their desire that any question of priority as aforesaid shall be litigated in said cause, then such issue as may be necessary shall be made up as the court shall direct, but the foreclosure of said general mortgage and collateral trust and the sale of the property embraced therein shall not be delayed thereby, but such litigation shall be determined with reference to the proceeds of the sale of the property embraced in said collateral trust, a sufficient portion of which shall be retained under the control of the court to protect the rights of such possible litigants.

The court further finds that there is now pending in the supreme court of the State of Ohio a certain cause in which James Compton and certain other persons named in the record thereof seek to establish and maintain a lien adjudged in their favor by the court of common pleas of Lucas county, in the State of Ohio, upon the line of railroad of said Wabash Company extending from Toledo, Ohio, to the eastern boundary of the State of Indiana, an appeal having been taken from the said judgment and decree of said court of Lucas county to said supreme court. It is ordered that this decree shall in no way affect the rights of said Compton and his co-complainants, as the same shall be determined by said supreme court. Any sale of the property aforesaid under this decree shall be subject to such rights and interests as said supreme court shall adjudge in said cause.

And now the court, being fully advised, does hereby order, ad-

judge, and decree that within sixty days from this date the Wabash Railway Company or some person or persons for it pay to
102 the Central Trust Company of New York for the benefit of the parties entitled the full sum of money found due as principal and interest aforesaid on said general mortgage bonds and coupons, together with interest from this date at the rate of six per cent. per annum, and all costs of this suit, except such as the court may otherwise apportion; that in default thereof the said general mortgage be foreclosed and all the property, rights, and interests aforesaid conveyed thereby or upon which said mortgage is a lien, as hereinbefore decreed, be sold, excepting as hereinafter set forth; and it is hereby ordered, adjudged, and decreed that the following-named lines of railway heretofore by order of this court severed from the Wabash system and surrendered to the trustees in underlying and senior mortgages or to some receiver, person, or persons appointed by the Federal court in whose jurisdiction said lines are situated, to wit, Havana Division, formerly known as the Champaign, Havana and Western railway; Indianapolis, Peru and Chicago railroad, the Chicago, Cincinnati and Louisville railroad, the Michigan City and Indianapolis railroad, together constituting the Indianapolis, Peru and Chicago Division; the Quincy, Missouri and Pacific railway, the Missouri, Iowa and Nebraska railway, the Cairo and Vincennes railway, the Danville and Southwestern railroad, and St. Francisville and Lawrenceville railroad, together constituting the Cairo Division, and the Toledo, Peoria and Western railroad, and also the Centreville, Moravia and Albia railroad, shall not be sold at said sale, nor shall any interest in said lines or any or either of them pass by the sale herein provided for, but the complainants herein and all persons interested in said lines are hereby
103 remitted to the said several Federal courts in whose jurisdiction said lines are situated for the adjudication and settlement of their respective claims and interests. The court further finds the Wabash Company to be wholly insolvent and the property, rights, and interests embraced in the general mortgage wholly insufficient security for the amount of indebtedness found due as aforesaid. It is ordered that the sale of said property, rights, and interests be without redemption, and said sale, when made and confirmed by the court and all the conditions thereof fully performed, shall forever bar and foreclose all right, title, and equity of redemption of said Wabash Company in said railroads, property, interests, and franchises and each part thereof, and also all the rights and interests of all persons claiming through or under said company subsequent to said general mortgage, and also all the rights and interests of all the parties hereto, except so far as the same are by this decree established or reserved.

It is also adjudged and decreed that said Wabash Company or some person for it, within sixty days from this date, pay to the Mercantile Trust Company of New York the amount of principal and interest found due as aforesaid on said collateral trust bonds, with interest thereon from this date at the rate of six per cent. per annum, and also such share of the costs of this proceeding as the court shall ap-

portion. In default thereof all the property, securities, rights, and interests covered by and described in the collateral trust shall be sold, and all the right, title, and interest of the Wabash Company therein and of all persons claiming through or under said
104 company be forever barred and foreclosed, and also all the rights and interests therein of all parties to said cause, except so far as the same are hereby established or reserved. The court finds and adjudges that all the property embraced in said collateral trust is wholly insufficient to pay the indebtedness secured thereby, and orders that the said property be sold without redemption.

It is further adjudged and decreed that if the holders of a majority of the general mortgage bonds, acting through their committee appointed under their agreement aforesaid, shall be satisfied that any branch or portion of the lines of railroad or property embraced in and covered by said mortgage, and in or to which the Wabash Company had only a leasehold or conditional title, shall be wholly insufficient in value to discharge the liens resting thereon superior to said general mortgage, and that sale of such branches or portions of railroad or property would add nothing to the purchase price obtainable for all said property, the commissioners shall, at the request of such committee, proceed to sell such branches or portions of railroad, with all the rights and property pertaining thereto, separately from the other property covered by said mortgage.

It appearing to the court that since the commencement of this cause the receivers herein have, under orders of this court, purchased and paid for, in whole or in part, certain lands and lots adjacent to the lines of railroad constituting the Wabash system, the title
105 thereof being taken to James F. How, as trustee; said How being the agent of said receivers, it is hereby ordered and decreed that all the lands and lots aforesaid so purchased by said receivers be sold with the main lines of road covered by the general mortgage; that an account be hereafter taken of all the moneys paid by said receivers for the lands and lots so purchased by them; that after the sale of the property embraced in the general mortgage there shall be taken out of the proceeds of such sale and out of the proceeds of all property sold in connection therewith a sum sufficient to repay to said receivers the amount of money expended by them in the purchase of the lands and lots aforesaid, so far as the same have been paid for, and said receivers shall hold the moneys so to be repaid to them to be expended under the orders of court for the general purposes of said receivership. Upon the sale of said property and upon full compliance with the conditions of said sale by the purchasers thereof said James F. How, trustee, shall, upon order of court, make proper conveyance of the said property to such purchasers.

The court further orders that the sale under this decree of any property, rights, or interest covered by said general mortgage shall not have the effect of debarring the holders of said general mortgage bonds or their trustees from foreclosing any other mortgages or deeds of trust given to secure said general mortgage bonds or portions thereof, whether such other mortgages or deeds of trust embrace

some of the lines of railroad and property covered by the general mortgage or otherwise; but if the sale or sales under this de-
106 cree shall not produce a sufficient sum to pay and satisfy all the said general mortgage bonds the holders thereof and their trustees shall be at liberty to resort to such other mortgages and deeds of trust as fully in force and effect.

It is further ordered and adjudged that this decree or any sale made thereunder of the property embraced in the collateral trust shall not prevent the owners of the collateral trust bonds, so far as said bonds shall remain unpaid after the application of the proceeds of said sale thereto, from resorting to any other instrument, mortgage, or pledge for the protection of the title to the property so embraced in said collateral trust; but the said bondholders and the purchasers of the property, rights, and interests embraced in the collateral trust at any sale made under this decree shall be at liberty to resort to such other instrument, mortgage, or pledge for the protection of their title to the property so embraced in said collateral trust and sold under the foreclosure thereof.

The court orders and decrees that, subject to conditions aforesaid, the property covered by the general mortgage and collateral trust be sold at public auction to the highest bidder or bidders at the east-front door of the United States court-house, in the city of St. Louis, in the State of Missouri, between the hours of 10 a. m. and 4 p. m. on such day as the commissioner hereinafter named shall appoint, with power to the commissioner making the sale for proper cause to postpone said sale without further notice, save an announcement of such postponement by said commissioner at the time fixed for such sale.

Public notice of the time, place, and terms of said sale shall
107 be given by publication at least once a week for six successive weeks before said sale in one public newspaper in each of the following-named cities, New York city, New York; St. Louis, Missouri, and such other places as the courts having ancillary jurisdiction of this cause or any of them may direct. Said notice shall describe the property to be sold in general terms and shall refer to this decree for more particular description.

Said sale shall be made in manner following:

The commissioner executing this decree shall, except as hereinabove otherwise provided, first offer for sale all the right, title, and interest of the Wabash Company in and to all the lines of railroad covered by and described in the general mortgage and such other lines, interest, and property as have been adjudged in this decree to have become subject to the lien of said mortgage, with all the franchises, rights, interest, and property, real and personal, pertaining thereto, and all rights of way, equipments, structures, shops, tools, machinery, and materials properly belonging or appurtenant to said lines and each of them, excepting only such of said lines, with the property, franchises, interests, and appurtenances, as are herein adjudged to be subject to said general mortgage only to the extent of the leasehold or conditional title of the Wabash Company therein, and also excepting all property described in the collateral trust,

whether covered by the general mortgage or not so covered, and which may be sold or offered for sale separately, as hereinbefore directed. In case any such line or property shall not be sold together with the other property covered by the general mortgage the same shall be offered separately, and the commissioner shall
108 conditionally accept the highest bids received therefor.

The commissioner shall then offer for sale the property embraced in the collateral trust in manner following: He shall offer all the bonds, stocks, and choses in action specified in said collateral trust together, and note the bids received therefor. He shall also offer the cars, rolling stock, and equipment described in said instrument for sale together, and note the bids received therefor. He shall then offer the steamers described in said instrument together, and note the bids received therefor. He shall then offer separately the real estate or terminal interests in Cook county, Illinois, described in said instrument, and note the bids received therefor.

After said properties and securities covered by the collateral trust have been so offered for sale separately the commissioner shall proceed to offer the whole thereof for sale together, and he shall conditionally accept the highest bids made for said lots or parcels of property and securities when offered separately or the highest bid for all said property when offered together, according as the one method or the other shall produce the largest sum in the aggregate.

Before any bid for any property sold under this decree shall be conditionally accepted by the commissioner he shall require the person or persons making such bid to deposit with him or subject to his order, in some bank to be by the commissioner selected, a sum in cash equal to ten per cent. of the whole amount of said bid when the amount of such bid shall be more than $100,000 and twenty per cent. on all bids below that sum.

As soon as any sale or sales shall have been made by the
109 commissioner in pursuance of this decree he shall report the same to this court for confirmation, further certifying to the court compliance by the purchaser or purchasers with the conditions hereinbefore prescribed.

If any such bid shall be accepted by the court and the party making the same shall fail to comply with all the conditions of sale and all orders of the court made or to be made with respect thereto, then the sum so deposited shall be forfeited and shall be applied to the payment of the expenses of resale or the costs of this cause or the payment of the bonds aforesaid, as the court shall order.

In case any bid shall be rejected by the court the deposit made by the bidder shall be returned.

And if any bid or bids shall be accepted and confirmed by the court and all the conditions of sale shall be fully complied with, or if the persons making such bids shall perform all such conditions as the court shall accept as sufficient for the time being, and when the court shall so order, the commissioner shall execute to such pur-

chaser or purchasers deeds of conveyance and transfer of all the property and interests sold by him under this decree.

And thereupon the complainants herein, to wit, The Central Trust Company of New York and James Cheney, as trustees of said general mortgage, and also The Mercantile Trust Company, defendant herein, as trustee of the collateral trust mortgage, and the mortgagee, the Wabash, St. Louis and Pacific Railway Company, shall severally and in due form convey to said purchasers all their interest as trustees and as mortgagors in and to the property sold by said commissioners to said purchasers or any of them.

110 Whenever any bid shall be accepted and approved by the court the party making the same shall deposit in such depository as the court shall direct such additional cash payment as the court may require and make such further cash deposits as may be ordered by the court.

It is further ordered that after the purchasers aforesaid shall have made such cash payments as the court shall order the said purchasers shall have the right to discharge the remainder of their respective bids by the use of the bonds aforesaid—that is to say, by using the general mortgage bonds and the collateral trust bonds to make payment for the property so purchased. All said bonds and coupons shall be received in making the payments, to which they may be applied respectively, ratably and without discrimination and at such valuation as would be equivalent to the distributive share applicable thereto if the whole sum bid had been paid in cash.

It is further adjudged that in order to enable the purchasers of said lines of railroad and property to raise the means necessary to discharge all claims, debts, and demands equitably chargeable against the same in preference to said bonds by the use of the securities of the new corporation intended to be organized to take said lines of railroad or the chief part thereof, if such purchasers shall make such cash payments as the court shall require and order and discharge the remainder of their bids respectively by the payment of cash or the use of bonds as aforesaid, such purchasers shall be entitled to the conveyance and assignment of the property

111 purchased by them and each of them, as hereinbefore provided; but such conveyance or assignment shall not have the effect of discharging any part of said property from the payment or contribution to the payment of claims or demands chargeable against the same, whether for costs and expenses, the expenses of the receivership of said property, and the full payment of all the debts and liabilities of said receivers or upon intervening claims allowed or to be allowed, or upon any other claims or allowances that have been or may be charged against said property or any part thereof or said receivers, either by this court or by any other circuit court exercising ancillary jurisdiction, or by any other court to which any of the parties hereto, including the receivers, have been hereby remitted in proceedings or actions ancillary hereto or otherwise.

Nor shall such conveyance, transfer, or assignment withdraw any of said railroads, property, or interests to be sold under this decree, as hereinbefore directed, from the jurisdiction of this and the other

courts aforesaid, but the same shall remain in the custody of the receivers until such time as the court shall on motion direct said property in whole, or from time to time in part, to be released to said purchaser or purchasers or any of them, and shall afterwards be subject to be retaken, and, if necessary, resold if the sums so charged or to be charged against said property or any part thereof, or said receivers, as aforesaid, *said* shall not be paid within a reasonable time after being required by order of this or said other courts. The conveyance and transfer of said property shall be subject to the
112 power and jurisdiction of the said courts, and the purchasers of any part of said property shall thereby become and remain subject to said jurisdiction so far as necessary to the enforcement of this decree, and such jurisdiction shall continue until all the claims and demands that have been or may be allowed against said property or any part thereof or said receivers by order of said courts shall be fully paid and discharged. The provisions aforesaid shall apply to the purchasers at said sale and to all persons taking said property through or under them.

The commissioner executing the decree shall apply the proceeds derived from said sale and also all the proceeds derived from any body, natural or artificial, in satisfaction of the claims charged or to be charged against said property and all parts thereof, as aforesaid, in the manner following:

First. To the payment of all the costs of this cause in this court and in all other courts wherein ancillary jurisdiction was taken, including such allowances as this and said other courts have or shall make for solicitors' and counsel fees and for the services of all trustees, masters, commissioners, clerks, stenographers, printers, and others rendering services in the prosecution of the several causes consolidated herein or ancillary to the original cause; also all the expenses of making said sale or sales and otherwise enforcing and carrying out this decree.

Second. To the payment of all the indebtedness of the receivers herein and all other claims which said courts or some of them may adjudge to be superior to said bonds, and to the payment of all labor and supply claims falling within the order of this court of May 29, 1884, which now are or may be unpaid.

113 Third. In payment of all expenses incurred by the committee of bondholders and the purchasing committee in bringing about the said agreement between the holders of the general mortgage bonds and the holders of the collateral trust bonds, and of carrying the same into effect, and generally in the reorganization of the Wabash Company, including a proper remuneration for the members of said committee.

Fourth. To the payment of the two classes of bonds aforesaid, *pro rata*, as far as the same can be paid in whole or in part out of the proceeds of said sale or sales or by the application of the bonds aforesaid in lieu of purchase-money, under the provisions of this decree relating thereto.

Edmund T. Allen is hereby appointed commissioner to execute this decree. He shall make and file in this court an affidavit faith-

fully and impartially to execute this decree and to obey the orders of this and the other courts aforesaid in the discharge of the duty hereby imposed. All claims and demands against said property or said receivers or the proceeds of said sales not hitherto or herein adjudged and determined, whatever the character of such claims and demands, are hereby reserved for future action by this and said other courts, and all questions arising under any answers of parties hereto and on all cross-bills and other pleadings or intervening petitions not herein or heretofore determined are hereby reserved for future adjudication, the settlement of the same being held not necessary to the purposes of this decree.

114 It is further ordered that the Central Trust Company of New York and James Cheney and the Mercantile Trust Company of New York or some of them present this decree to the other courts entertaining ancillary jurisdiction of the said consolidated cause and pray that the same be approved by said courts and entered as the decree thereof.

All bids conditionally accepted by said commissioner for any railroad property or interest ordered to be sold by this decree shall be reported to said courts as their several jurisdictions may require and be subject to confirmation or rejection by said courts.

The court also adjudges that the indemnity mortgage referred to in the bills of complaint herein, made by the Wabash Company to the St. Louis, Iron Mountain and Southern Railway Company, is subject and inferior to the lien of the general mortgage and collateral trust.

The statements in this decree of the amount of bonds outstanding or of interest or rental, paid or unpaid, on any of the mortgages, deeds of trust, leases, or contracts herein declared to be superior to the lien of the general mortgage or collateral trust shall not be taken as adjudicating or determining the matters so stated. Such amounts are so stated in this decree only for the purpose of enabling persons who may desire to purchase said property to determine approximately the amount of prior liens or other charges upon said property and each part thereof.

It is ordered that said commissioner make full report of his doings to this court.

(Signed) DAVID J. BREWER,
Circuit Judge.
SAMUEL TREAT,
District Judge.

115 & 116 On the 5th day of March, 1885, a supplemental decree of sale was entered, making certain corrections and alterations in the description of certain of the property and interests to be sold.

12. On the 26th day of April, 1886, the railroads and property directed by said decree and supplemental decree to be sold were offered for sale by said commissioner, and said Joy, Ashley, Hubbard, and

Welles, trustees, became the purchasers of certain of said railroads and property, including the tracks and right of way, the use of which is claimed by intervenors as aforesaid, for the price and the sum of $625,000, subject to the terms and condition- of said decree of foreclosure and sale.

13. Report of sale was filed by said commissioner on the 28th day of April, 1886, and an order of confirmation made by the court on the 15th day of June, 1886. By said order of confirmation said commissioner was ordered to execute to the purchasers
117 & 118 at said sale (including said Joy *et al.*, trustees) proper deed or deeds of conveyance in accordance with said decree of sale of all and singular — premises, property, and franchises purchased upon compliance by them with the conditions contained in said order of confirmation, and subject to the terms and conditions of said decree of sale.

14. Said commissioner on the 20th day of September, 1886, filed in said consolidated cause his report, setting forth that said Joy *et al.*, trustees, had fully complied with the terms of said order of confirmation and had paid over to said commissioner the sum of $625,000 by them bid for the property by them purchased as aforesaid. With said report said commissioner filed forms of deeds to be by him executed to the purchasers at said sale.

15. On the 25th day of September, 1886, said last-mentioned report came on to be heard before the court and was confirmed, and said commissioner was ordered and directed to execute
119 & 120 and deliver to said "purchasing committee" proper deeds to the property by said committee purchased as aforesaid. The forms of deeds filed by said commissioner were approved except as in said order mentioned.

The Central Trust Company of New York and James Cheney, as trustees of said "general mortgage;" the Mercantile Trust Company, as trustee of the "collateral trust mortgage;" said Wabash, St. Louis and Pacific Railway Company, and Solon Humphreys and James F. How, trustees (of certain real estate), were also by said last-mentioned order directed to severally and in due form convey to said purchasers all their interest as trustees and as mortgagors in and to the property sold by said commissioner to said purchasers.

16. The deeds and conveyances aforesaid ordered to be made, executed, and delivered by said commissioner, Central Trust Company, Cheney, Mercantile Trust Company, Wabash Railway Company, Humphreys and How, to said purchasers (including said "purchasing committee") have been made, executed, and delivered as ordered and directed.

121 & 122 17. Said purchasing committee at the date of the appeal herein hold title, as aforesaid, to said property, which title is subject to be hereafter defeated and divested by non-compliance with the terms of said decree and subsequent orders of the court.

Signed this — day of January, A. D. 1887.

LEVERETT BELL, &
Solicitors for City of St. Louis.
NOBLE & ORRICK,
Solicitors for St. L., K. C. & C. R. R. Co.
HENRY T. KENT,
Solicitor for W., St. L. & P. R'y Co.
PHILLIPS & STEWART,
Solicitors for Central Trust Company & James Cheney.
PHILLIPS & STEWART,
Solicitors for "Purchasing Committee."

123 *Bill of Complaint of Intervenors, The City of St. Louis and The St. Louis, Kansas City & Colorado R. R. Co. Filed July* 12, 1886.

UNITED STATES OF AMERICA,
Eastern District of Missouri.

In the Circuit Court of the United States for the Eastern District of Missouri.

CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants,
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*, Defendants.

Consolidated Cause. In Equity.

To the honorable the judges of said court:

Your orators, The City of St. Louis, a municipal corporation duly authorized, organized, and acting under the laws of the State of Missouri, and a citizen of said State of Missouri, and the St. Louis, Kansas City & Colorado Railroad Company, a corporation duly authorized, organized, and acting under the laws of the State of Kansas, and a citizen of the said State of Kansas, intervening herein, complain of the Wabash, St. Louis & Pacific Railway Company, a corporation duly authorized, organized, and acting under the
124 laws of the State of Missouri, and a citizen of said State of Missouri, in said eastern district, — say:

First. That on the — day of ——, 1884, by the order of this court, Solon Humphreys and Thomas E. Tutt were duly appointed receivers of the said Wabash, St. Louis & Pacific Railway Company, and that they are now such receivers and in charge of the property, affairs, and business of said company as officers of this court, subject to its direction; that said Wabash, St. Louis & Pacific Railway Company owns a right of way, with a standard-gauge track thereon, in the city of St. Louis, commencing at 18th street, in said city, near Poplar street, at the Union depot, in said city, running west to the east line of Forest park, in said city; thence through said park to Union avenue, in said city; thence in a northeasterly direction to the town of Ferguson, in the county of St. Louis; thence in a north-

erly direction to the city of Moberly, in the county of Randolph, State of Missouri; thence west to Kansas City and thence north to Ottumwa, Iowa; that prior to the 11th day of August, 1875, the St. Louis, Kansas City & Northern Railway Company was a railroad corporation of the State of Missouri and then owned a line of railway in the city and county of St. Louis running to a point opposite the city of St. Charles, in St. Charles county, State of Missouri, passing through the town of Ferguson, in St. Louis county; thence in a direct line to the city of St. Louis, at or near Biddle street, on the levee of said city; that on said 11th day of August, 1875, said St. Louis, Kansas City & Northern Railway Company, being desirous of obtaining an entrance to the said Union depot in said city of St. Louis, which depot was then and is now located at or
125 near 18th and Poplar streets, in said city, for the purpose of reaching said Union depot at said point, determined to build a branch railway from said town of Ferguson, in said St. Louis county, extending in a southeasterly direction from said town of Ferguson to Union avenue, in the city of St. Louis; thence through said Forest park; thence to said 18th street, in the city of St. Louis, at said Union depot.

Complainants further state that at said date—that is to say, August 11th, 1875—the body of land, consisting of about 1,300 acres, known as "Forest park," and which was then situated in the county of St. Louis and near the western limits of said city of St. Louis, was under the control and management of a board of commissioners, of which Andrew McKinley was president and Charles Bland Smith was secretary; that said board of commissioners were duly appointed and acting under an act of the Legislature of the State of Missouri approved March 25th, 1874, being an act entitled "An act to establish Forest park, in the county of St. Louis, and to provide for the establishment and government thereof, and to provide for the issue of bonds by the county court of St. Louis county for the purposes of said park and for the purchase and condemnation of lands for the same."

That under and by virtue of the said act the said board of commissioners did duly establish said Forest park for the people of the county of St. Louis; that the said board, under the said act, had power to lay off, improve, adorn, and generally govern, manage, and control the use of said park and the avenues surrounding the same, together with other powers given and granted under and by said act.

126 That prior to the 11th day of August, 1875, the St. Louis County Railway Company, a corporation duly authorized, organized, and acting under the laws of the State of Missouri, was the owner of a right of way for its road through said park, commencing at a point on the north side of said park, where Union avenue intersects said park, thence in a southeasterly direction through said park to the eastern line of the same; thence in the same direction to said 18th street, in the city of St. Louis, at the said Union depot; that the said St. Louis, Kansas City and Northern Railway Company found it necessary, in order to complete and

operate its said branch railway from said town of Ferguson to said Union depot, to obtain a right of way from said board of commissioners through said park; that thereupon, on the 11th day of August, 1875, the said St. Louis, Kansas City and Northern Railway Company and the said St. Louis County Railroad Company entered into an agreement for the joint use of the right of way of said St. Louis County railway through said park and up to the terminus of its road in the city of St. Louis at 18th street.

That by the terms of said agreement the said St. Louis County Railroad Company and the said St. Louis, Kansas City and Northern Railway Company were to own the right of way and the railway thereon from said point on north line of said park to a point on east line of said park, and to a point at east end of tunnel and cut next east of said east line of said park, and enjoy the joint use thereof for the purposes of their respective roads. The said St. Louis, Kansas City and Northern Railway Company was to advance all sums necessary to complete the construction of the railway between
127 the said points, and the said St. Louis County Railroad Company was to pay to said St. Louis, Kansas City and Northern Railway Company one-half of any sum so advanced by it for the purpose last aforesaid; that by the said agreement if the said St. Louis County Railroad Company failed to pay said one-half of said sum, being about the sum of $125,000, to said St. Louis, Kansas City and Northern Railway Company it could not enjoy the use of said railway between the said points; that the said St. Louis County Railroad Company did fail to pay the said one-half, as provided in and by the said contract, and thereupon the said St. Louis, Kansas City and Northern Railway Company, under the said agreement and the tripartite agreement herein mentioned, held the said right of way under and subject to the terms thereof, a duly certified copy of which agreement is herewith filed, marked Exhibit "A."

That after the execution of said agreement, to wit, on the 11th day of August, 1875, the board of Forest park commissioners and the said St. Louis County Railroad Company and said St. Louis, Kansas City and Northern Railway Company duly entered into a certain tripartite agreement of that date, duly recorded in the recorder's office of the city of St. Louis, September 5th, 1879, in Book 620, page 8, whereby the said board of Forest park commissioners granted and conveyed unto and licensed and permitted the said St. Louis, Kansas City and Northern Railway Company, its successors and assigns, to have, hold, use, and enjoy the said right of way, forty-two feet wide, theretofore owned by said St. Louis County Railroad Company in, upon, and through said park in com-
128 mon with and to be held and enjoyed jointly with said St. Louis County Railroad Company and its assigns on the terms of the said contract between them, and under the terms and conditions that said St. Louis, Kansas City and Northern Railway Company, its successors and assigns, should permit other railroads to use its right of way in and through said park and up to the terminus of its road in the city of St. Louis upon such terms and for such fair and equitable compensation to be paid to it therefor as might be

agreed upon by said companies. A certified copy of said agreement is herewith filed, Exhibit "B."

Said St. Louis, Kansas City & Northern Railway Company in the year 1875, subsequent to the execution of and under said agreement, did construct said railroad from said Eighteenth street to said Union avenue and soon thereafter built its said road from said town of Ferguson and entered upon and operated the same from said town of Ferguson through said park to said Eighteenth street, the point where the said Union depot is located; that on the — day of ——, 1879, the said St. Louis, Kansas City & Northern Railway Company, then in the exclusive possession of said right of way and railroad, duly assigned, conveyed, and transferred all its property, rights, and franchises of whatever nature to the defendant, The Wabash, St. Louis and Pacific Railway Company, and since said date the said latter company has used, enjoyed, and operated all the property formerly owned by said St. Louis, Kansas City and Northern Railway Company, including the said railroad from said Union avenue to Eighteenth street, and now in the exclusive possession and enjoyment thereof; that on the — day of ——, 1876, the
129 limits of the said city of St. Louis were lawfully extended westwardly, so as to include the whole of said Forest park, and said city duly became and is now the owner of the said park, with full power to control and manage the same. The said board of Forest park commissioners was in the year 1876, by law, duly abolished, and the said city then became, has ever since been, and is now the successor of said board of Forest park commissioners and the owners of said park and invested with all the rights reserved by the said board under the contract or otherwise heretofore made for or on behalf of said park by the said board; that the said city of St. Louis, one of the orators herein, is by law charged with the duty of protecting the said park and interested in preventing the said park from being cut up by lines of railway seeking entrance to said city, and in limiting other railroads, including said St. Louis, Kansas City & Colorado Railroad Company, to the use of said right of way through said park and to said Union depot and in enforcing the said tripartite agreement for the benefit of said St. Louis, Kansas City & Colorado Railroad Company and other railroads that may seek an entrance through said park to said Union depot; that the said city is a large municipal corporation, having a population of about 500,000 inhabitants—is an important commercial center to which different lines of railway from year to year are seeking entrance to its Union depot. The said Union depot is a point to which all railways entering said city converge; that to avoid the cutting up of said park and thereby destroy its beauty and attractiveness, as well as to afford facilities for other railways to enter the said Union depot, said board of commissioners,
130 in and by the said tripartite agreement of August 11th, 1875, imposed the condition that the said St. Louis, Kansas City & Northern Railway Company, its successors and assigns, should permit other railroads, under such reasonable regulations and terms as might be agreed upon, to use its said right of way through the

said park and up to the terminus of its road in the city of St. Louis upon such terms and for such fair and equitable compensation to be paid as might be agreed upon by said companies; that the said Wabash, St. Louis & Pacific Railway Company now holds and enjoys the said right of way through and under the terms and conditions of the said agreements and not otherwise.

Your orators further say that the St. Louis, Kansas City & Colorado Railroad Company has completed its railway of standard gauge from the city of St. Louis to Creve Cœur lake, a distance of about twenty miles, and that the same is now ready for operation; that it is engaged in further constructing its road in the State of Kansas, as well as in the State of Missouri, with a view of operating the same from said State of Kansas into and through the State of Missouri to said city of St. Louis; that its railway which has been built from said Creve Coeur Lake to the city of St. Louis now forms a junction with the railway of said Wabash, St. Louis & Pacific Railway Company at Forsyth junction, a point at or near the north line of said park at said Union avenue, and desires to avail itself of the provisions of said tripartite agreement by using the right of way of said Wabash, St. Louis & Pacific Railway Company through said park and to the terminus of its road in said city of St. Louis at 18th street at said Union depot; that said St. Louis,
131 Kansas City & Colorado Railroad Company was duly incorporated as aforesaid on the — day of ——, 1884, and has constructed its railway as aforesaid since said date.

Your orators allege that by and under the terms of said tripartite agreement the said St. Louis, Kansas City & Colorado Railroad Company is now entitled to the use of said right of way of said Wabash, St. Louis & Pacific Railway Company through said park and up to the terminus of its road in the city of St. Louis at said 18th street, the said right of way being about four miles in length, by paying to it the fair and equitable compensation for such use; that the said St. Louis, Kansas City & Colorado Railroad Company has applied to said receivers, Solon Humphreys and Thomas E. Tutt, for the use of said right of way on the terms of said tripartite agreement, and endeavored to agree with them upon the amount of money to be paid to them as a fair and just compensation for the use of said right of way; but said Wabash, St. Louis & Pacific Railway Company, through said receivers, refused absolutely and unqualifiedly and do now refuse to permit said St. Louis, Kansas City & Colorado Railroad Company to run its trains over its said right of way upon any terms, and deny that said company has the right to use said right of way as claimed. The said St. Louis, Kansas City & Colorado Railroad Company have offered to pay them such fair and equitable compensation as may be just, and now offers to pay such fair and equitable compensation as this honorable court by its order and decree may require.

Your orators further state that by reason of the refusal of the said Wabash, St. Louis & Pacific Railway Company, through
132 the said receivers, to permit the use of said right of way as aforesaid the interests of the city of St. Louis are suffering,

and the said St. Louis, Kansas City & Colorado Railroad Company is prevented from operating its railway, and has thereby suffered and is now suffering irreparable damage and loss by reason of the refusal aforesaid.

Wherefore your orators pray that a writ of injunction issue out of and under the seal of this honorable court, enjoining and restraining the said Wabash, St. Louis and Pacific Railway Company and the said Solon Humphreys and Thomas E. Tutt, as such receivers, and each of them and of their agents, servants, counsellors, and employees, from in any manner refusing to permit your orator, the St. Louis, Kansas City & Colorado Railroad Company, under such reasonable regulations and terms as to this court may seem proper, from using the said right of way of said Wabash, St. Louis & Pacific Railway Company, commencing at the north line of said park where the railway of said Wabash, St. Louis & Pacific Railway Company enters said park, thence over said right of way to said 18th street, in said city of St. Louis, by running its engines and cars over and upon said right of way, including the tracks of said Wabash, St. Louis & Pacific Railway Company between the points at said Union avenue and said 18th street; that a temporary injunction pending the said hearing thereof against the said defendants as herein prayed be granted; that the said receivers, Solon Humphreys and Thomas E. Tutt, be ordered to permit said St. Louis, Kansas City & Colorado Railroad Company to use said right of way and tracks between said points last above named on the terms aforesaid, and that your
133 orators may have such further relief in the premises as is consistent with equity and good conscience and as to this honorable court may seem meet.

May it please your honor to grant unto your orators a writ of subpœna directed to the defendants, and thereby commanding them and each of them to be and appear before this honorable court at some certain date to be fixed therein, and answer the premises and abide by and perform such order and decree as may be passed therein and as to your honor shall seem meet; and your orators, as in duty bound, will ever pray.

LEVERETT BELL,
Solicitor for the City of St. Louis.
NOBLE & ORRICK,
Solicitors for St. Louis, Kan. City & Col. R. R. Co.

DYER, LEE & ELLIS, *Of Counsel.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, } ss:

L. M. Potter, being duly sworn, says that he is the president of one of the complainants, The St. Louis, Kansas City & Colorado Railroad Company, named in the above bill, and that the matters alleged and set forth in the above bill, so far as they are stated upon knowledge, are true, and so far as they are stated upon information and belief he believes them to be true.

L. M. POTTER.

STATE OF MISSOURI, } ss:
City of St. Louis, }

Sworn to and subscribed before me this tenth day of July, A. D. 1886.

Witness my hand and official seal.

C. D. GREENE, JR.,
Notary Public.

134 *Agreement between St. Louis County Railroad Company and St. Louis, Kansas City & Northern Railway Company.*

This agreement, made this eleventh day of August, A. D. 1875, by and between the St. Louis County Railroad Company, party of the first part, and the St. Louis, Kansas City and Northern Railway Company, party of the second part, witnesseth:

That the party of the first part, a railroad corporation of Missouri, having acquired the title to or right of way over numerous pieces of land along its route for a railroad, as designated on chart "A," hereto annexed, and the deeds for which are herewith shown to the party of the second part, and the party of the second — being also a railroad corporation of Missouri, and the lines and routes of said companies, as now established, being continuous and connected in this State, and for the purpose of reaching the Union depot at St. Louis, Missouri, and other purposes the party of the second part desiring and requiring a right of way and the real estate necessary to establish and maintain its route thereto forever over a part of the right of way and real estate of the party of the first part, as well as over the lands of others, and having power under the laws to
135 acquire a right of way along its said established route either by purchase, condemnation, or otherwise and along and over the lands of the party of the first part or others and through Forest park, as well as outside thereof;

And whereas it is desirable and intended to have an amicable adjustment of all differences and conflicting claims and rights:

Now, therefore, the parties hereto, each for itself, its successors and assigns, do covenant, promise, and agree as follows:

The party of the first part, in consideration of the premises and of the covenants, promises, and agreements of the party of the second part herein contained, does hereby covenant, promise, and agree to grant, bargain, sell, and convey by good and sufficient deed or deeds of general warranty out of each and every tract or parcel of land now held or owned by it, and which tracts of land are designated on said chart "A," a lot twenty-eight (28) feet in width and extending through each of said tracts from the blacksmith shop at the junction of the Olive-street road and the old Bonhomme road, in St. Louis county, to the northern line of Forest park; and also a lot of same width (28 feet) extending through each of said tracts from the eastern line of Forest park to the western limits of the city of St. Louis; and also a lot thirty (30) feet in width extending through each of said tracts from said city limits to Tayon avenue, in said

city of St. Louis; and also an undivided one-half of all the right, title, or interest of the party of the first part of, in, or to the right of way and of, in, or to any and all other rights, privileges, and franchises, powers, and immunities owned by or vested in or
136 enjoyed by, or that may hereafter be acquired and owned by, vested in, or enjoyed by, the party of the first part in, through, or upon Forest park by any means or from any source whatever.

It being understood, however, that where the party of the first part has only the right of way over any of said tracts outside of said park it shall convey by said deed or deeds said right of way; and where said first party has not and does not claim to have a width of land or right of way equal to the width above called for, but some lesser width, it shall convey by said deed or deeds all of said lesser width; but in all cases all the right, title, and interest of said party of the first part as claimed by it shall, to the width of lot herein agreed upon, be conveyed by said deed or deeds to the party of the second part, its successors and assigns, so as to make a regular, continuous, and practicable route, road-bed, and right of way for the party of the second part, so far as the party of the first part is able to grant it, and as laid down and marked out on said chart "A," hereto annexed and referred to.

And whereas there is a tunnel and cut to be made by the party of the second part as contemplated, extending eastwardly from the eastern line of said park, said party of the second part hereby covenants and agrees to let the trains of the party of the first part pass through said tunnel and cut under the same regulations and restrictions as to running and time-tables as herein agreed upon concerning trains in said park and elsewhere:

To have and to hold all and singular said lots, rights of
137 way, and other property unto said party of the second part, its successors and assigns forever, with all the rights, privileges, and franchises, powers, immunities, improvements, and appurtenances thereto belonging or in anywise appertaining.

And with the additional and especial right and privilege to the party of the second part, its successors or assigns, to make all necessary, proper, or usual cuts and fills on the property of the party of the first part, so as to give at least twenty-eight or thirty feet (as the case may be) at grade to the party of the second part for its tracks; and it is fully understood and agreed that this right and privilege to make cuts and fills shall be had and enjoyed by the party of the second part, its successors or assigns, along the whole route, and shall extend not only to the lots above agreed to be conveyed, but to any others it may acquire, and where the party of the first part may have or acquire lands or rights of way or other interests adjacent: Provided, however, that the use and enjoyment of the rights, privileges, and franchises, powers, immunities, improvements, and property in, through, and upon Forest park and in, through, and upon said proposed tunnel and cut adjoining the eastern line of Forest park and under Barnes avenue and to the eastern end of said cut shall and are to be in common and jointly used by the parties hereto, their successors and assigns.

But it is agreed and covenanted that to accommodate the running arrangements of the party of the second part said party of the second part shall have the absolute and sole control of the running, starting, and regulating of the time-tables of and for its own trains; and it is further agreed and covenanted that no train, locomotive,
138 car, or other conveyance of the party of the first part, its successors or assigns, shall be allowed or attempted to be started or run within eight (8) minutes of the time fixed or stated for the starting, coming in, or running of the train or trains of the party of the second part, its successors or assigns; and there shall be twenty minutes' time between the starting and coming in of the trains of the party of the second part, and this matter as to said specified times shall be under the sole control and regulation of the party of the second part; and it is further agreed and covenanted that the party of the first part shall have and maintain the only depot in said park, as far as the parties hereto are concerned, and that said party of the second part shall not have a depot nor stop any of its trains in said park.

And said party of the second part, for and in consideration of the premises and other the covenants, promises, and agreements of the party of the first part herein contained, does hereby covenant, promise, and agree to pay to the party of the first part, its successors and assigns, within sixty days from the delivery and ratification of these presents and the deed or deeds hereinbefore provided for, the sum of one hundred and twenty-five thousand dollars ($125,000) in currency, for which it is to make its notes in sums of five thousand dollars each, at the date and as of the date of said delivery and ratification hereof, reserving the sum of thirty-seven thousand dollars, which sum is to be placed, at said delivery and ratification, in the hands and possession of John R. Lionberger, of St. Louis, as trustee, who shall therewith pay off the notes and indebtedness of said party of the first part secured by certain
139 deeds of trust of record on portion of the property now owned by the party of the first part, and if anything remains after said payments are made by said trustee he shall pay it over to the party of the first part, its successors or assigns.

And whereas at two certain points or places, to wit, at and from the eastern line of Compton avenue, thence eastward not exceeding two hundred feet, and also at and from the point five hundred and fifty feet west from Tayon avenue, and thence eastward toward Tayon avenue as far only as necessary, where the right of way or property of said party of the first part is narrowest, it may become desirable and necessary to said party of the first part to lay one rail on said property to be conveyed to said party of the second part: It is therefore hereby mutually covenanted and agreed that at said designated places the party of the first part will use the street or streets adjacent thereto if it can legally do so and the grade of said street or streets is suitable and conforms to the grade of the road; but if the streets cannot be so used or should not so conform the party of the second part shall allow the party of the first part to lay and use one rail upon the property of the party of the second part

for such distance as is necessary: Provided, however, that the placing and running and passing of trains at said places shall be under such regulations as may be mutually agreed upon.

And it is hereby further mutually covenanted, promised, and agreed that neither party shall in any manner, directly or indirectly, interfere with, obstruct, hinder, or compete with the other in acquiring its own property or right of way for a continuous line or route as herein contemplated and on chart "A" marked down, or
140 in having, holding, and enjoying any right of way or property when so acquired; and where proceedings for condemnation or other process or proceedings or negotiations have been commenced by the party of the first part or on its behalf the same shall, as to the width hereby agreed to be conveyed and contemplated to be acquired and enjoyed to and by the second party, be discontinued or prosecuted as the party of the second part, by its president, may in writing direct, and within five days thereafter, said second party paying the damages and expenses therefor.

And whereas, under this agreement and a certain agreement between the parties hereto and the commissioners of Forest park, of even date herewith, the party of the second part is about to, and hereby, in consideration of the covenants and agreements of the party of the first part, hereinafter particularly set forth, and of the covenants and agreements of said commissioners of Forest park in said agreement with them contained, does covenant and agree to construct and maintain a railroad bed and road in, upon, and through said Forest park and the tunnel and cut hereinbefore specified, according to certain plans and specifications agreed upon and according to the terms and conditions of said agreement with said commissioners, for the joint use of both the parties (of the first part and of the second part) hereto, their several successors and assigns; and in consideration of all the premises and as inducement to said party of the second part to proceed with said construction and maintaining, the party of the first part does hereby covenant, promise, and agree to pay to the party of the second part, its successors and assigns, within two years from the delivery of these pres-
141 ents, as shall be indorsed hereon by either party, one-half of the actual cost of construction of said road-bed and road through said park and said tunnel and cut, unless within said two years said party of the first part determines it will not use the same or any part thereof and delivers to said party of the second part a good and sufficient deed granting and conveying to said party of the second part, its successors and assigns, any and all right, title, or interest in law or in equity it may have in and to said road-bed, road, or property in said park, tunnel, and cut free and clear of all incumbrances; and if said election and conveyance is not made within the time specified by it said party of the first part does covenant and agree to pay, besides one-half of the cost of construction, also the one-half of the actual cost of maintaining said road-bed and road in, upon, and through said park and said tunnel and cut from and after the time the party of the first part commences to use

the same during or within the said period of two years and as long as it continues to use the same within said period of two years; and if it continues to use the same after said period of two years, then forever thereafter whether it uses the same or not.

And, for the purpose of fixing said payments to be made, it is agreed that the said cost of construction is to be taken and paid at whatever sum may be sworn to in affidavits by any chief engineer and treasurer of the party of the second part as correct and as appearing on and from the construction account on the books of said second party, and said cost of maintaining is to be taken and paid at whatever sum may be sworn to in affidavits by the superintendent and treasurer of the party of the second part and as appear-
142 ing upon and from the books of said second party; and it is further expressly understood, covenanted, and agreed that should said party of the first part, its successors or assigns, fail or refuse to make the said payments or either of them or any part thereof on demand at any time after the same or either of them becomes due or payable as aforesaid and as often as the same may occur and for sixty days after such demand, then all the rights, privileges, franchises, powers, immunities, improvements, and property of said party of the first part in, through, or upon said Forrest park and in, into, through, over, or upon said tunnel and cut shall become, by virtue and force of said failure and refusal, without further process or proceedings, forfeited and belong to the party of the second part, its successors and assigns; and in case of such forfeiture no further payments, as above provided, are to be made by the party of the first part, but the party of the second part may and hereby is fully authorized and empowered to at once enter upon the sole and absolute possession and enjoyment of all said rights, privileges, franchises, powers, immunities, improvements, and property to the exclusion of said party of the first part, its successors and assigns, and said party of the first part hereby further covenants and agrees for itself, its successors and assigns, upon its failure to pay as aforesaid, that it (said first party) shall and will by a good and sufficient deed convey all said rights, privileges, franchises, powers, immunities, improvements, and property to said party of the second part, its successors and assigns.

It is further covenanted and agreed that the party of the first part may, within said period of two years from the delivery of
143 these presents, lay a third rail for a narrow-gauge track through said park, tunnel, and cut, provided the same be done in a manner not to interfere with running of trains or operation of the road as it requires by the party of the second part: And provided further, That whether it lays a third rail or not the party of the first part is to make payment for construction and maintaining of said road and road-bed as hereinabove provided.

In testimony whereof the said parties hereto have caused these presents to be executed by their respective presidents and attested

by their respective corporate seals, with the signature of their respective secretaries, the day and year first above mentioned.

THE ST. LOUIS COUNTY RAILROAD CO.,
By JOSEPH BROWN, *President.*

Attest: H. R. BRIGGS,
[SEAL.] *Secretary.*

ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY CO.,
By B. W. LEWIS, JR., *President.*

Attest: JAMES F. HOW,
[SEAL.] *Secretary.*

144 STATE OF MISSOURI, } ss:
City of St. Louis, }

I, Daniel O'C. Tracy, register of the city of St. Louis, hereby certify that the above and foregoing is a true and perfect copy of the original on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of the city of Saint Louis this ninth day of July, A. D. 1886.

DANIEL O'C. TRACY, *Register,*
Per H. WOODS, *Deputy.*

UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

In the Circuit Court of the United States in and for said District.

Be it remembered that on the 12th day of July, A. D. 1886, the following, among other, proceedings were had and appear of record in said court, to wit:

At chambers, before the Honorable David J. Brewer, circuit judge, at Leavenworth, Kansas, July 12th, 1886.

CENTRAL TRUST CO. OF N. Y., *et al.*, Complainants, } 2357 & 2464.
vs. } (Consolidated.)
WABASH, ST. LOUIS AND PACIFIC R'Y CO. *et al.*, Defendants. }

145 *In re* intervening petition of City of St. Louis and St. Louis, Kansas City and Colorado Railroad Company.

It is ordered that the intervenors herein have leave to file the bill herein; that the same be referred to Edmund T. Allen, special master, with instructions to make his report thereon on or before the 24th instant, in which report he shall set forth the facts as well as his conclusions of the law on the bill, and also report a sum that would be a fair and equitable compensation for the use of right of way and tracks of the Wabash, St. Louis and Pacific Railway Com-

pany, as prayed for in the bill of complaint, and also the rules and regulations under which said use shall be enjoyed by said complainant railroad if said use shall be given.

And it is further ordered that the further hearing of this complaint be continued until the 26th instant, at 11 o'clock a. m., at chambers in the city of Leavenworth, Kansas, and that complainants serve a copy of this order on the receivers of the said Wabash, St. Louis and Pacific Railway Company or their solicitor, Wells H. Blodgett, Esq., within three days from this date.

July 12, 1886.

(Signed) DAVID J. BREWER,
Circuit Judge.

146 UNITED STATES OF AMERICA, *Eastern District of Missouri,* } ss:

In the Circuit Court of the United States in and for said District.

Be it remembered that on the 13th day of July, A. D. 1886, the following, among other, proceedings were had and appear of record in said court, to wit:

At chambers, before the Honorable David J. Brewer, circuit judge, at Leavenworth, Kansas, July 13, 1886.

CENTRAL TRUST CO. OF N. Y. *et al.*, Complainants, *vs.* WABASH, ST. LOUIS & PACIFIC R'Y CO. *et al.*, Defendants. } 2357 & 2464. (Consolidated.)

In re intervening petition of City of St. Louis and St. Louis, Kansas City and Colorado Railroad Company.

It is ordered that George H. Shields, Esq., be, and he is hereby, appointed special master herein, to be substituted in place and stead of Edmund T. Allen, Esq.

147 In the United States Circuit Court, Eastern District of Missouri.

CITY OF ST. LOUIS, ST. LOUIS, KANSAS CITY & COLORADO R. R., Intervenors in Central Trust Co. of N. Y., Complainants, *vs.* WABASH, ST. LOUIS AND PACIFIC R. R. *et al.*, Respondents. } Consolidated Cause. In Equity. Nos. 2357 and 2464.

The above-entitled petition having been referred to me as special master *pro hac vice*, I, George H. Shields, do solemnly swear that I will obey the Constitution of the United States and will faithfully discharge my duties as special master therein, according to the best of my ability, so help me God.

GEO. H. SHIELDS.

Subscribed and sworn to before me this 14th day of July, 1886.
[SEAL.] A. P. SELBY, *Clerk.*

148 UNITED STATES OF AMERICA, *Eastern District of Missouri,* } ss:

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true copy of order referring intervening petition of city of St. Louis *et al.* to E. T. Allen, and also copy of order substituting Geo. H. Shields in place and stead of Allen as special master in case No. 2357 and 2464 of Central Trust Co. of New York *et al.*, plaintiffs, against Wabash, St. Louis & Pacific R'y Co. *et al.*, defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said district, this 14th day of July, in the year of our Lord eighteen hundred and eighty-six.

[SEAL.] A. P. SELBY,
Clerk of said Court.

149 In the Circuit Court of the United States for the Eastern District of Missouri.

THE CITY OF ST. LOUIS; ST. LOUIS, KANSAS CITY & COLORADO R. R. CO. *et al.*, Intervenors in Central Trust Company of N. Y., Complainants, *vs.* WABASH, ST. LOUIS AND PACIFIC R. R. COMPANY *et al.*, Defendants.	Consolidated Cause. In Equity. Nos. 2357 and 2464.

The petition and exhibits in this case, together with the order of reference, having been delivered to George H. Shields, special master herein, by Mr. A. P. Selby, the clerk of the circuit court of the United States for the eastern district of Missouri, on July 14th, 1886, warrants for hearing were issued to the solicitors for the respective parties interested, and the case set down for hearing in the United States circuit court room in the custom-house, in the city of St. Louis, at ten o'clock a. m., on July 15th, 1886, at which time there were present as follows: The master, John C. Orrick and D. P. Dyer, representing the intervenors, and Wells H. Blodgett, Warwick Hough, and Mr. Priest, representing the receivers, when the following proceedings were had:

150 MASTER: I desire to make this statement to the gentlemen present: Two or three days ago Mr. E. T. Allen came to me showing me the order of reference in this case and asking me if I knew anything about the matter or had any connection with it. I replied no. He then asked me if I would serve as master if it was satisfactory to Judge Brewer. Some conversation passed about the length of time it would take, because I expected to go East pretty

soon. The result was that I said if it was satisfactory to Judge Brewer I would accept the appointment. Mr. Allen said he would telegraph to Judge Brewer, and Judge Brewer made the order appointing me in Mr. Allen's place as master *pro hac vice*. Yesterday Col. Blodgett came to me and said he was informed that I had been of counsel in matters connected with the St. Louis County Railroad Company. I said I had no recollection of it, but that since he mentioned it I remembered that Henderson and Shields had been of counsel for some of the parties interested in the St. Louis County Railroad Company as stockholders and directors, regarding some controversy between themselves. In that controversy Henderson and Shields represented James O. Broadhead, Joseph Brown, and F. C. Sharp's estate. I went to the State circuit clerk's office this morning to inform myself thoroughly in regard to those cases. They had escaped my memory entirely until Col. Blodgett spoke to me about it. I found there were three cases in which Henderson and Shields were counsel. One of the cases was a suit of Sutton in behalf of the stockholders of the St. Louis County Railroad Company against Broadhead, Brown, and Sharp's estate and others, claiming that the directors of the railroad company had organized a construction company to build said railroad
151 for the purpose of defrauding the other stockholders of their interests in said road, and that they illegally obtained a majority of the railroad company's stock, and with it controlled the board of directors of the company, in fraud of the rights of the other stockholders, and that they had sold the property of the railroad company to the St. Louis, Kansas City and Northern Railroad Company for $125,000 00, which they fraudulently retained for their own use instead of dividing it among the stockholders, and asked an accounting and payment of the money to the company for the benefit of the stockholders and general relief. Henderson and Shields were connected with this case before it was disposed of, and I remember to have taken some depositions in the matter. The plaintiffs were nonsuited on the 22d day of February, 1877. Another case was that of Amos H. Shultz, on behalf of the stockholders of the St. Louis County Railroad Company, against Broadhead, Brown, and Sharp's estate, claiming that they illegally came into possession of 419 shares of stock of the St. Louis County Railroad Company; that an election was about to be held, and it was claimed that if defendants voted that stock they would control the board of directors of the company and thereby be enabled to misappropriate and misapply the funds, which they intended to do. An injunction was granted against voting the stock at the election. Henderson and Shields appeared for the defendants. The case was subsequently dismissed at the plaintiffs' cost on the 27th day of January, 1877. Subsequently, at the February term, 1877, Herman A. Hauessler and Sallie A. Sharp, as administrators of F. C.
152 Sharp, brought suit against the St. Louis County Railroad Company, Rufus J. Lackland, and Gerard B. Allen, as trustees, and others, alleged to be owners of certain bonds issued by said company to foreclose a mortgage made by said company on its prop-

erty and franchises on the 5th day of October, 1875, and to prevent the railroad company from disposing of other bonds of the same issue which had not been negotiated. Henderson and Shields represented the plaintiffs in this suit. It was dismissed by plaintiffs on the 2d day of April, 1877. My recollection is that none of these suits were ever tried, but the matter was amicably settled between the parties. I have the papers and the copies of the petitions in these cases here, so that you can examine them. I have no recollection of ever being connected in any way with any other matters growing out of the St. Louis County railroad. If I had remembered these cases at the time Mr. Allen came to me I should probably have declined to accept the position, for the reason that I think that if there ever was a subject on which the Apostolic injunction to "avoid even the appearance of evil" applies it is in judicial matters. These suits all involve controversies between the construction company and the stockholders of the St. Louis County Railroad Company and between the directors and individuals of these two corporations. How far these questions will be involved in this hearing you, gentlemen, must determine for yourselves. I think it is due to you, gentlemen, and to myself that I should make this statement. I feel that if any of the questions involved in these old cases are likely to arise in the pending matter that I should not hear the case, and will telegraph to Judge Brewer to appoint some one else.

153 Col. BLODGETT: We have no objection on our part to your having the case.

Mr. ORRICK: We have no objection on the part of the intervenors.

MASTER: Then I understand that all parties consent that I shall sit in the case, notwithstanding my having been connected with these other matters.

Mr. ORRICK: None of those questions you mentioned can possibly come up in this case.

MASTER: I have had warrants for the hearing of this case this morning served on Mr. Bell, Messrs. Dyer, Lee & Ellis, Messrs. Noble & Orrick, and Messrs. Phillips & Stewart. I sent notices also to Mr. Henry T. Kent's office, but was informed he was absent in Europe. I then telegraphed to Messrs. Green, Burnett & Humphreys, at Springfield, Ills., that the hearing would take place this morning. The notice is necessarily short, as the master is compelled to file his report on the 24th inst. The order seems to require or contemplate a notice only to the solicitors for the receivers, and you, gentlemen, who represent the plaintiffs must take the responsibility of proceeding now or of giving further notice to the attorneys for the railroad company.

Mr. ORRICK: We know that the receivers' counsel got notice. That is all that is necessary.

Mr. BLODGETT: We want to reserve the right to file an answer by to-morrow morning if we should think it necessary.

Mr. ORRICK: I don't know that we object—have any objections to their filing an answer.

MASTER: I shall permit them to file an answer *on* or be-

154 fore ten o'clock to-morrow morning in order to know what

the issues are. I understand this proceeding to be for the purpose of information to the circuit judge as to the facts and law arising in the matter, upon which he will frame his own order in the case, and that either party has a right to present any facts or propositions of law arising in this controversy.

We will now adjourn till to-morrow morning at ten o'clock.

Pursuant to adjournment, as above stated, on July 16th, 1886, the hearing of the case was resumed.

Present: John C. Orrick, Esq., and D. P. Dyer, Esq., solicitors for the intervenor; John W. Phillips, Esq., solicitor for the Central Trust Company of New York and James Cheney, trustees, and W. H. Blodgett, Esq., Warwick Hough, Esq., and H. S. Priest, Esq., solicitors for the receivers.

Counsel for the receivers state that they have concluded they will not file an answer in the case.

Counsel for the intervenor offered in evidence Exhibit "A" to the bill, being a certified copy of an agreement between the St. Louis County Railroad Company and the St. Louis, Kansas City and Northern Railway Company, dated August 11th, 1875, and states that the plat called chart A in the agreement is the same as the plat now shown to the master, which it is agreed may be used in lieu thereof; that the property marked blue on the plat is the right of way sold by the St. Louis County Railroad Company to the St. Louis, Kansas City and Northern Railway Company by the deed of August 11th, 1875, and also indicates the line of the St. Louis County railroad through the park to which the contract of August, 11th, 1875, refers.

155 Counsel for the receivers admit that the right of way through the park, as fixed by the tripartite agreement, is forty-two feet, the St. Louis County railroad having originally seventy feet and leasing twenty-eight feet by a contract.

Counsel for the intervenor offers in evidence a certified copy of the contract between the commissioners of Forest park and the St. Louis County railroad and the St. Louis, Kansas City and Northern Railway Company, being a tripartite agreement, dated August 11, 1875, and recorded September 5th, 1879, in the recorder's office of the city of St. Louis, in Book 620, p. 8, together with the exhibit attached thereto, being a plat showing the grades as agreed upon in the tripartite agreement attached to the contract, marked Exhibit B to the bill.

Counsel for the intervenor offers in evidence the acts of the Legislature mentioned in the bill, with the agreement that they may be read from the session acts of the State, and also the scheme and charter, with the agreement that it may be read from the statutes.

Counsel for the receivers admit that the whole of Forest park is in the city limits of the city of St. Louis, and is administered and has been since about the year 1876 by the park commissioners as a part of the city government.

Counsel for the receivers admit that the allegation of the petition with respect to the acquisition by the Wabash, St. Louis & Pacific

Railway Company of the property of the St. Louis, Kansas City & Northern Railway Company is true, and that it was acquired on November 11th, 1879.

156 It is admitted that the dotted lines on chart A indicate the line of road of the Wabash, St. Louis & Pacific Railway Company as at present constructed and substantially as constructed in 1875 and 1876.

Counsel for the receivers admit that the right of way through the park is forty-two feet in width, and that the strip in blue acquired from the St. Louis County railroad east of the park is thirty feet in width as a rule.

S. T. EMERSON, sworn for the intervenor, testifies as follows:

Direct examination by Mr. ORRICK:

Q. What is your business?

A. Civil engineer.

Q. How long have you been a civil engineer?

A. Thirty-six years.

Q. Please state in your experience what you have done in connection with railroads.

A. I have had a continuous experience for thirty-four of the thirty-six years; in operation some of the time, and the balance of the time construction.

Q. Have you ever operated railroads?

A. As operating engineer.

Q. Were you at any time chief engineer of the St. Louis, Kansas City & Northern Railroad Company?

A. I was.

Q. When?

A. From 1870 to 1879.

Q. What connection, if any, did you have with the contruction of the branch railway of the St. Louis, Kansas City and Northern railroad from Ferguson through Forest park to Eighteenth street?

157 A. I was chief engineer of the road at that time and had charge of the construction of that branch.

Q. How long is that branch?

A. A trifle over eleven miles.

Q. Do you know what it cost to build it?

A. It cost about $840,000.00.

Q. Did that include the right of way and everything?

A. The total cost.

Q. Will you state what the cost of that portion of the road was from Eighteenth street or the Union depot to the north line of the park?

A. $360,000.00.

Q. Where it enters the park?

A. Where it leaves the park going west.

By the MASTER:

Q. That includes through the park?
A. Yes, sir.

By Mr. ORRICK:

Q. The Union depot grounds come to the west side of Eighteenth street?
A. I believe they do.
Q. Or Papin street?
A. I believe they do. Our road terminated at the west side of Eighteenth street.
Q. That is where the western limits of the Union depot grounds end?
A. I suppose it is; I don't know positively. That is the information I have.
Q. You superintended the work of construction between the Union depot, the north line of the park, and Ferguson?
A. Yes, sir.
Q. It was done under your immediate supervision?
A. It was.
Q. I understood you to say that $360,000.00 was the total cost, including what was paid the St. Louis County railroad.
A. Yes, sir.

158 Q. Did you build this road on the line of the St. Louis County railroad east of the park?
A. Yes, sir.
Q. To Eighteenth street?
A. We did on their located line.
Q. How wide was that right of way? Do you remember?
A. Thirty feet.
Q. That is east of the park?
A. That is east of the park.
Q. Do you remember what it was in the park?
A. I don't know about the park.
Q. Did the St. Louis, Kansas City & Northern railroad pay for the whole of the construction in Forest park?
A. They did not pay for the masonry. They paid something toward the Boulevard bridge; either one-half or something about that.
Q. Who built the bridge at the entrance—where you go under the large bridge?
A. The Forest park commissioners.
Q. They did also the stone-work through the tunnel?
A. All the stone-work. There are two culverts and a viaduct.
Q. That was all paid for by the Forest park commissioners?
A. All except the Boulevard bridge. I don't remember what proportion they paid.
Q. Do you remember how much the board contributed in dollars—about?
A. No, sir. I say the Forest park commissioners paid for all the

masonry in the park except a portion of the Boulevard bridge. I don't know what share was paid towards that; I think one-half.

Q. Can you give the master, without stating the figures, whether it was a considerable sum paid by the Forest park commissioners?

159 Yes, sir; it was a considerable sum. It was good masonry, good work, and cost considerable money.

Q. Several thousand dollars?

A. Yes, sir.

Q. Now, this work that was done and paid for by the board of Forest park commissioners, please state whether that work was a necessary part of the construction of the road or whether it was used by the railroad as a part of it.

A. In making up the cost of that portion of the line?

Q. I mean this: I refer to the money paid for masonry. Please state what connection that masonry had with the construction of the road—whether it was necessary and proper for the railroad to have it.

A. It was necessary, but a little extravagant. The company, if they had had to pay for it themselves, might have gotten along a little cheaper.

Q. Suppose the park commissioners had not done it, who would have done it in order to complete the railroad?

The counsel for the receivers object to this testimony as irrelevant.

Objection overruled by the master.

By Mr. ORRICK:

Q. How many tracks, if any, are on the right of way where the Wabash railway now enters the park from Eighteenth street, the thirty feet from Eighteenth street to the park and the forty-two feet through the park?

A. There are occasional places where there is a side track. There could not be but one track besides the main track on the thirty feet.

Q. In the main it is a single track?

A. A single-track road.

Q. Where is that track located, with reference to the

160 right of way?

A. The main track?

Q. Yes, sir; in the center of the thirty feet?

A. I could not say where it is exactly—whether it is the center or not.

Q. About.

A. It is in the thirty feet; but I cannot tell without a measurement.

Q. What kind of iron or steel did you put down there?

A. I think it was fifty-six-pound steel.

Q. Is it there yet?

A. On this side of the park the original steel is there, in my opinion.

Q. How about through the park?

A. Through the park there is heavier steel. I think they have put new steel there—sixty-pound steel.

Q. Have you examined the track recently?

A. Yes, sir.

Q. When?

A. During this week.

Q. How did you examine it?

A. I walked over it.

Q. Please state to the master, if you can, what the value of that track is, laid as now. I mean by that the ties, iron, and other material in the track. In other words, what the track, as it stands, irrespective of the real estate on which it is located, is worth.

A. The steel is badly worn. The ties are old and rotten. The ties are in very poor condition. I should think the value of the track as it now stands would be about fifty per cent.—depreciated about fifty per cent.

Q. Depreciated about fifty per cent.?

A. Yes, sir; the ties more than that. Take it altogether, I should take it that way. It is rather a poor track.

Q. Do you know what the ties when laid cost as new ties—as laid in the track; what they were worth?

A. Thirty-eight cents apiece.

161 Q. How about that steel in 1875 and 1876?

A. I am not sure what it was worth then. I think $80.00 a ton.

Q. What is steel worth now?

A. $37.50. That is what we are buying it for.

Q. Can you give me the exact distance between the end of the Wabash track at Eighteenth street and the north line of Forest park where the Wabash enters the park?

A. It is a trifle over four miles—four miles and some two hundred and twenty feet.

Q. Have you made any estimate in round numbers of the difference in money between the cost of those ties, the track as originally laid, and the present value between the north line of the park and Eighteenth street?

A. The cost of the ties only?

Q. No; between the value of the track as it is now and its cost in the first instance between Eighteenth street and the north line of the park. Give me the difference in value in round numbers.

A. Yes, sir; I think about $25,000.00.

Q. Which way?

A. Below.

Q. It is $25,000.00 less than it cost?

A. Yes, sir.

Q. What did the track cost per mile when laid in 1875 and 1876—I mean the track irrespective of the right of way or embankment—simply the track, by which I mean the ties, spikes, iron, and splices laid?

A. About $40,000.00.

Q. As laid?
A. As originally laid.
Q. I understand you to say the track cost $40,000.00?
A. The superstructure—the track, ties, spikes, and splices.
Q. And there is a depreciation of fifty per cent.?
A. Easy.
162 Q. Is there any stone ballast on the track?
A. Yes, sir.
Q. How much?
A. It struck me there was about 1,700 or 1,800 yards to the mile. It would take about that for a foot of ballast. I think that is what they put on.
Q. Please describe to the court this cut and tunnel through the park towards the east part of the park. What is its depth, its width, and the character of the wall?
A. That boulevard? I did not measure the length of it. I suppose from recollection the length is 300 feet and the width in the clear is twenty-eight feet.
Q. The width in the clear is twenty-eight feet?
A. On the grade line. The walls batter and fall back as they rise.
Q. What is the character of the walls—how high are they and how deep is the excavation?
A. I did not measure it. I think it is 18 feet above the grade and probably two feet below. It would be a twenty-foot wall.
Q. How wide is the space between the walls at the base of the walls?
A. When I answer that I speak of my recollection of the agreement made at the time to be twenty-eight feet wide at grade. I have not measured them for a number of years—not since the construction.
Q. State whether in the cut there is one or two tracks in the park.
A. From the boulevard to the western end there are two tracks. The track extends, maybe, forty feet this side of the boulevard bridge and there terminates, and the rest is only one track.
Q. Did you notice the condition of the tracks as to whether they are being used or not?
163 A. There was a car standing on one of them—what I would term a side track. It looked to me as if just thrown there for no purpose whatever except to keep somebody else from laying a track there.
Q. Is there room for any other track there?
A. No room, only for the two in the thirty feet. There is only room for the main track and the side track. That is all you can get in thirty feet.

By the MASTER:

Q. You mean by that answer you can only put one main track on a thirty-foot right of way.
A. You can put two main tracks; two tracks.

By Mr. ORRICK:

Q. From your experience with railroads and your connection with them can you state what the cost of maintaining a mile of railroad per year would be on a road such as the Wabash?

A. A single-track railroad will not exceed $600.00 per mile a year.

Q. What do you mean by maintaining or maintenance?

A. I mean keeping up the depreciation of the rails, spikes, splices, and ties, and wear and tear.

Q. Is $600.00 a high estimate?

A. It is a high estimate. I see by the late reports of the Chicago and Northwestern it does not spend but $500.00.

Q. Then on four miles and 224 feet it would be——

A. $2,400.00.

Q. I want to state to you a hypothetical case: Suppose that one railroad has a right under a contract to use the track of another railroad for a fair and equitable compensation between certain points, can you tell me what would be a proper basis to ar-

164 rive at such fair and equitable compensation?

A. Well, I should think it ought to be arrived at in proportion to the use.

Q. Explain to the master how you would arrive at it.

A. On a wheelage basis.

Q. What would the wheelage basis be on?

A. On the interest of the cost of the property first and the cost of maintenance.

Q. What do you mean by a wheelage basis?

A. I mean on the proportionate number of cars run over the road by the different railroads using it. Take the total number of cars used on it and get the percentage. For example, suppose the road (used) is worth $100,000.00——

Q. Take the interest at what rate?

A. Six per cent.

Q. On that amount?

A. Yes, sir.

Q. That is $6,000?

A. Yes, sir; $6,000.00.

Q. How would that $6,000.00, to be paid per annum, be divided between the different roads using the track?

A. In proportion to the number of cars run over the road by each road. For instance, suppose one road runs 500 cars and the other runs only 100; that would be 600.

Q. What proportion of $6,000.00 would each road pay?

A. The road running 100 cars would pay one-sixth of the $6,000.00.

Q. And the road running 500 cars would pay $5,000.00?

A. It would pay five-sixths, or the balance.

Q. How about the maintenance of the road?

A. I should think it would be on the same basis exactly.

Q. State to the master whether you consider that afair and equi-

table mode of arriving at the compensation under such an agreement as that.

A. I should.

Q. You are the chief engineer of the St. Louis, Kansas City and Colorado railroad?

A. Yes, sir.

165 Q. State to the master how much railroad they have built and where it is located.

A. They have got a track laid from Forsyth junction to beyond Creve Coeur Lake and a branch this side of the lake to East Lake and some track laid in the pass. Taking the whole thing altogether, we have about twenty-one miles of track laid. We have in St. Louis county and Franklin county some ten miles of completed grade and a force working on the balance, and we have several miles of completed grade in Kansas, from the city of Fort Scott this way, and the contract let from Fort Scott this way about twenty-five miles. They are now working on it.

Q. How long will it consume to complete the road to Union, with the work you have done?

A. Until some time in November.

Q. How far will that be?

A. Fifty-four and a half miles.

Q. How about the road between Forsyth junction and Creve Coeur Lake? Is that ready for operation now?

A. That is ready.

Q. Where is Forsyth junction, with reference to the northern line of the park?

A. A little over 3,300 feet west of the west line of Union avenue.

Q. It is just north of the park?

A. Yes, sir.

By the MASTER:

Q. How far north of the park?

A. It is about 350 or 400 feet north of the north line of the park.

By Mr. ORRICK:

Q. What is the gauge of the St. Louis, Kansas City and Colorado railroad?

A. Four feet eight and a half inches.

166 Q. What is the gauge of the Wabash from the north line of the park to the depot?

A. Four feet eight and a half inches.

Q. Then they are the same gauge?

A. Yes, sir.

Q. Is that road now being operated?

A. It is for construction purposes.

Q. For any other purpose?

A. No, sir.

Q. Why?

A. Because we cannot get into town.

Q. Will you please state the damage, if any, this company is suffering by reason of not being able to come in?

A. Well, it is a serious injury to the company.

Q. It is practically hung up out there?

A. Yes, sir; shut off.

Q. Please state whether there is an opportunity to do business between Union depot and Creve Cœur Lake on this line.

A. A very fine chance.

Q. How about this season of the year in particular?

A. At this season of the year in particular, and the wheat is moving in from out there. We are not getting the trade.

Q. How about excursion business to the lake in the summer time?

A. We are losing all that—all that we would get of it.

Q. That is a summer resort?

A. Yes, sir.

Q. It is about the only one around the city, is it not?

A. I believe it is.

Q. Please state whether the running of the road to the Union depot would be an accommodation to the public as well.

A. Yes; it would be a great accommodation to the public. Parties have made application—several parties out on the Olive-street road and beyond—who are anxious to patronize the road and get into the city and get on it to transact business.

167 Q. You have not done that because you cannot get to the depot?

A. No, sir.

Q. State whether Forsyth junction, the point to which the road is completed, is within the city limits.

A. Yes; it is within the city limits.

Q. I will ask you whether railroads keep a record of wheelage over their roads.

A. Yes, sir; they do; most roads do—I suppose all roads.

Q. Would there be any practical difficulty in keeping a wheelage record here?

A. No, sir.

Q. Is it an ordinary thing for a railroad to do?

A. They all do it.

Q. How often, in your judgment, would it be fair to make a settlement on a wheelage basis?

A. I suppose they settle every thirty days. I don't know how often they settle.

Q. Do you think that would be fair?

A. Yes, sir. I should not suppose they would settle any oftener. I don't know as they settle as often as that.

Cross-examination by Col. BLODGETT:

Q. You are now the chief engineer of the petitioner in this case?

A. Yes, sir.

Q. And have charge of the construction of its line of road?

A. I have.

Q. You were chief engineer of the St. Louis, Kansas City and Northern railroad at the time it constructed this line from Ferguson to the Union depot?

A. Yes, sir.

Q. Did you have charge of the construction of the line?

A. Yes, sir.

Q. Did you have charge of the matters pertaining to the acquiring of the right of way?

A. No, sir.

168 Q. Do you know how much the company paid for the right of way it purchased and condemned between the Union depot and the eastern line of the park?

A. No; I don't know separately.

Q. Do you know how much the right of way from the north line of the park to Ferguson cost?

A. No, sir.

Q. What did you say was the total cost of the line from Ferguson to the Union depot?

A. $840,000.00.

Q. How much of that amount was for the right of way?

A. I could not detail it.

Q. Can you state from your own knowledge or even approximate the cost of the right of way or the amount paid by the company on account of the right of way between Forsyth junction and the Union depot—from your own knowledge?

A. I could only get at — in this way: that is to tell about the amount I spent. I suppose the balance was spent for the right of way, attorney's fees, and various other costs.

Q. Now, you say the total cost was $840,000.00. Will you state to the master how you ascertained that fact or how you know?

A. I got that by the figures I had of what I spent and by consulting and talking with the auditor as to the balance of the money that had been expended. I got it up myself as a matter of curiosity at the time to know what the line cost.

Q. You say that this St. Louis, Kansas City and Colorado Railroad Company has a line constructed from Forsyth junction to Creve Cœur Lake?

A. Yes, sir.

Q. When did your company commence constructing a line actively?

A. Some time in February of this year.

Q. February, 1886?

A. Yes, sir; that is, laying track. I went to work the first
169 of December last year. We commenced receiving material and were laying track in the latter part of February, 1886.

Q. And since the latter part of February, 1886, they have constructed the twenty miles?

A. Yes, sir; they have laid and graded a great deal beyond.

Q. Was there any part of that line west of Forsythe junction constructed by any another company?

A. Yes, sir.

Q. By what company?

A. I don't know; the Forest Park and Central, I understood. I had no connection with it.

Q. It was graded by what was known as the Forest Park and Central?

A. Yes, sir.

Q. And the St. Louis, Kansas City and Colorado railroad is its successor in title?

A. I suppose it is.

Counsel for the intervenor admit that the intervenor bought the grade and right of way of the Forest Park and Central, but did not buy their franchise.

Q. When you say that the cost of the line from Ferguson into Union depot was $480,000.00 you mean, I suppose, to be understood as saying that that was the amount disbursed up to the time the road was opened?

A. Yes, sir; up to the time the road was opened.

Q. And that it does not include the properties acquired afterwards, subsequently, as shown in chart "A?"

A. I don't know what they have acquired.

Q. It does not include the property since acquired?

A. It was the cost of the road up to about July, 1876.

Q. Soon after it opened?

A. Soon after it was opened.

Q. When was it opened?

A. In June, 1876.

Q. And your estimate of the cost comes down to about July?

A. Soon after we got it opened.

170 Q. You stated, I believe, that the cost of the materials, the ties, iron, spikes, splices, etc., in the track from Union depot to Forsyth junction was about $40,000.00?

A. It was worth that at that time; I don't know what it cost.

Q. At the time the road was constructed it cost that?

A. The structure value was about $40,000.00.

Q. Now, you say the material has deteriorated, has lessened about one-fourth?

A. About one-half. The ties are worse than that.

Q. According to your estimate, it would cost about $20,000.00 to make it a first-class road from Union depot to Forsyth junction?

A. It would not, because steel is cheaper now than it was then.

Q. What would it cost now to make it a first-class road?

A. You can get your steel at $37.00 instead of $80.00 a ton—that is, about one-half the price—and you can get your ties——

Q. You need not go into detail, but figure it up to make a first-class road of it.

A. You could relay it all new and make it first class for $21,000.00. That does not deduct anything for the old steel you could sell. You could have it all new and put it in first-class condition for $21,000.00.

By Mr. ORRICK:

Q. You say you do not deduct the value of the old steel?
A. No; that would be for sale.
Q. What would that be worth per ton?
A. I don't know; I am not posted on the values.

By Judge HOUGH:

Q. It would cost $600.00 a mile after that to keep it in repair?
A. Yes, sir. Immediately after it is built it does not cost $600.00 a year.

171 By Mr. ORRICK:

Q. Does that include renewal?
A. Yes, sir; to keep it in the same shape you find it.
Q. That $600.00 a year includes renewal of the track?
A. To keep it in the same shape you find it.
Q. And the purchase of new rails, if necessary?
A. Yes.

By Judge HOUGH:

Q. That is $5,000.00 a mile it would cost to put it in good repair?
A. In first-class condition. You would get something out of that for your old material. You could put it in good repair for less than $21,000, because you could rebuild it new for that.

By Mr. ORRICK:

Q. How much could you put it in good repair for?
A. Deducting the value of the old material? I don't know what the old stuff is worth a ton. It is worth something. There is ninety-four tons to the mile of old rail.

By Judge HOUGH:

Q. $600.00 a mile now will not put it in good repair?
A. It will keep it as good as it is.
Q. That is not the question. Will it put it in good repair?
A. No, sir; certainly not.

By Col. BLODGETT:

Q. You are the chief engineer of the petitioner?
A. Yes, sir.
Q. At what other points is that company constructing a road?
A. From Fort Scott towards Clinton, in a northeasterly direction.
Q. How much road have they in operation out there.
172 A. They have not any. They are grading from Fort Scott this way.
Q. How much have they graded?
A. I have not been there in a month. I should think they had over three miles of grading done at this time, from the amount we have paid.
Q. You have charge of the vouchers?

A. I issue vouchers on the estimates of the engineer there, who makes measurements.

Q. You think by this time they have graded three miles in the State of Kansas?

A. Yes, sir.

Q. From Fort Scott in the direction of Clinton, in the State of Missouri?

A. Yes, sir.

Q. How far is Fort Scott from the Missouri line?

A. Five and a half miles.

Q. Has your company any grading or any railroad in Missouri at any point between the points you have mentioned until they get into Franklin county?

A. We are grading in Franklin and St. Louis counties and in Bourbon county, in Kansas. Those are the only counties we are grading in.

Q. The only railroad the company has in operation is in Missouri?

A. That is all.

By Mr. ORRICK: We have not any in operation. We have the track laid.

By Mr. BLODGETT:

Q. Do you know when the company was incorporated?

A. No, sir.

Q. Will you please state to the master the terminal points and the counties, as near as you can remember, in which it is expected to build the road?

A. In Missouri?

173 Q. From where it begins in Kansas.

A. Commencing at St. Louis county, Franklin county, Gasconade, Osage, Maries, Miller, Cole, Morgan, Benton, Henry, St. Clair, Bates, and Vernon.

Q. Then what counties in Kansas?

A. I am not so familiar in Kansas; it goes in Bourbon, and then southwest to the southern tier of counties in the State of Kansas, and then directly west through the southern tier of counties.

Q. Do you recollect the names of the towns or counties through which the road is projected through Kansas?

Counsel for the intervenor objects to this as incompetent and irrelevant.

Objection overruled by the master.

A. From Fort Scott southwest I cannot name the counties without a map.

Q. As chief engineer of this line I suppose you can inform the court how much has been expended in grading in the State of Kansas?

A. Well, including the June estimates, up to the 1st day of July, it is something over $6,000.00 on expenditure in Kansas.

Q. And how much in Missouri?

A. Something over $300,000.00.

Q. Since you commenced in February?

A. That has been expended, that I know of. There are other expenses that don't come under my charge; I don't know how much more we have spent; we have spent that, anyway.

Q. In constructing the line in Missouri you have already expended over $300,000.00?

A. Yes, sir.

Q. Does that include the acquisition of the right of way or the old grade and right of way of the Forest Park and Central?

A. I had nothing to do with that.

174 Q. The disbursements of which you speak have been made in the construction of the line?

A. Yes, sir.

Q. Under your supervision?

A. Yes, sir.

Q. Do you know whether any profile map of the intended line through the State of Missouri has been filed in any of the counties through this State?

Counsel for the intervenor objects to the question as immaterial and irrelevant.

A. There has been in St. Louis county and Franklin county, in Missouri, and Bourbon county, in Kansas.

Redirect examination by Mr. ORRICK:

Q. Please state whether you are now making your surveys from Union west towards Fort Scott, and whether you have surveying parties out.

A. Yes; the locating party is now out.

Q. How far have you surveyed west of Union?

A. About sixty miles.

Q. Are the surveying parties going on now?

A. Yes, sir; they are sixty miles out.

Q. State whether you have made any survey from Bourbon county east.

A. To Clinton, Missouri.

Q. What is the distance?

A. Sixty-five miles.

Q. This party is going to Clinton from the east?

A. Yes, sir.

Q. How many are in this party?

A. Thirteen.

By Judge HOUGH:

Q. We neglected to inquire whether any surveys have been made or any location west of Fort Scott, Kansas.

A. Only about ten or twelve miles. We have run a line down there ten or twelve miles.

Q. What kind of a line?

A. A preliminary line.

175 Q. You have made no actual survey of the road-bed?

A. We have made no location.

Q. You have made no location of the road to any extent west of Fort Scott, Kansas?

A. We have only located it to the western line of the corporate limits of Fort Scott.

Q. Your line is not located beyond the western limits of Fort Scott?

A. No, sir.

By Mr. ORRICK:

Q. You have been asked about the work done here at this end in Missouri. What has been done in Kansas? Please explain why you have been so active at this end.

A. Well, we have been trying to hold our own here. This was the important place to hold, I suppose. I don't know what policy the board of directors has. I have acted subject to their orders.

Q. Do you know about the attempt to get the right of way from them?

A. There has been an attempt to get the right of way from us.

Q. Do you know of any proceedings by the Missouri Pacific to get the right of way?

A. Yes, sir; there was a trial took place on the ninth of this month.

Q. That made it necessary to put the force here to hold it?

A. There was a very important pass for us to hold up there a little ways if we expected to build the road.

Q. After you had men there did the Missouri Pacific attempt to take the right of way?

A. Yes, sir.

Q. Do you know what the Wabash Company charges the St. Louis, Kansas City and Colorado Company for pulling a car-load of iron from the Union depot to Forsyth junction, five miles?

176 A. Not positively. I have heard, but it was so outrageous a price that I could hardly believe it, and I think I must be wrong.

Q. What is your understanding?

Counsel for the receivers object to the question as immaterial and irrelevant.

Objections sustained by the master.

Q. Speaking of this track through the park to the Union depot, did I understand you to say all the rails were in bad condition or whether any are new rails?

A. I don't think any of them are new rails. They are worn rails.

Q. Now, in putting the cost of maintenance at $600.00 a mile, do you mean for the master to understand, it cost $600.00 a mile per year to maintain a track in first-class condition?

A. Yes, sir.

Q. I mean to spend that per annum after it has been put in first-class condition.

A. Yes, sir; the first year or so you would not spend that much; I mean the general average through years.

Q. Does that include the cost of renewal?

A. Yes, sir; every article that goes into the track.

Q. In what direction does the material come that goes into the road in construction?

A. The material we have received has come from the other side of the river.

Q. The east side?

A. Yes, sir.

Q. And the most convenient road would be over what road to reach Forsyth junction?

A. Over the Wabash.

Q. There is no other road?

A. There is no other road.

Q. Now, from that point—Forsyth junction—to the Union depot, what is the most or the only practical entrance to the depot from that point?

A. The Wabash railroad.

177 ANDREW MCKINLEY, sworn for the intervenor, testifies as follows:

Direct examination by Mr. ORRICK:

Q. What was your position in the year 1875 in connection with Forest park?

A. I was president of the park.

Q. You are the same Andrew McKinley who signed the tripartite agreement on the part of the commissioners at Forest park?

A. I have not read this through. I suppose it is the same.

Q. You remember the agreement?

A. I remember an agreement.

Q. Will you please inform the master what amount of money the board of Forest park commissioners contributed to the construction of the St. Louis, Kansas City and Northern railroad through the park?

A. My recollection is not very distinct, but I think about $39,000 or $40,000.

Q. In what was that expended?

A. It was expended in the bridge as it enters the park between the entrance and where it comes out in the park. The main pathway under the bridge is the principal access to the park from Lindell avenue, and the two culverts, the one on the left-hand side as you go to the park and the other on the right-hand side, intended for foot passengers.

Q. Do you remember how you happened to make that expenditure?

A. Well, at the time that the right of way was granted and that agreement was made we had not decided what we would do with the

eastern boulevard of the park. I have not seen that contract
178 from that day to this—from the day it was signed—not read it over at all, but I observed that it was provided that the park might, by its election, either improve or leave open the open cut or improve it at its own cost so far as the eastern end of the park was concerned. It made the other improvements not probably by any contract or instrument, but they made them as a necessity growing out of the improvements of the park. I do not know as there was any contract, but there was a contract by which the railroad agreed to pay a part of the narrow-gauge access to the park a little north or northwest of the principal entrance that passes underneath. The railroad had not acquired any right of way up to the time of this agreement. All of the covenants in that were in consideration of the right of way.

Q. At that time what was the size of Forest park; how many acres did it contain?

A. 1,372.

Q. Where does Forest park lie with reference to the city of St. Louis and where did it lie then with reference to the then city of St. Louis?

A. Its northeastern corner corresponded with the north line of Lindell avenue, and since that time it has been extended fifty feet from King's highway to Union avenue, running north of the park, which was given by Mr. Griswold under certain conditions.

Q. At that time, prior to the tripartite agreement, had any railroad been constructed through the park?

A. No, sir; not through the park as a park.

Q. How many railroads are run through there now, if any?

A. None that I am aware of, except the Wabash. I want to explain that the bill creating Forest park contains, if my memory serves me, this proviso: that nothing in this act contained—I have
179 not seen it of late, I put it in myself—shall prevent the St. Louis County railroad from obtaining a right of way through the park, provided they enter on the eastern side through Duncan's subdivision, running west and passing north of the River Des Peres—shall leave the park at the north line thereof east of Union avenue. I very often have had occasion to speak of that. I suppose that is very nearly the language of the proviso.

Q. What was the policy of the board with reference to railroads passing through the park at this time—at the time of the execution of the tripartite agreement?

A. There was a great deal of discussion and there was quite a controversy about where the road should run under the provision which I have mentioned, and it lasted several weeks probably. There was almost a daily meeting on that account. Mr. Sharp, I think, conducted the controversy, so to speak, between the parties on the one side as the representatives of the St. Louis County Railroad Company, and Gov. Reynolds on the side of the park.

Q. Was there any discussion about other roads using the right of way at the time of the tripartite agreement?

Counsel for the receivers object to the question. Objection sustained.

Q. Please describe the park to the master, whether it has been improved, and, if so, how, in a general way.

A. The provisions contained in the proviso that I have just spoken of were intended to protect the park against the invasion of all railroads unquestionably. I put it there myself.

Q. What effect would the invasion of the park by railroads
180 have upon the park for the purpose for which it was established?

A. I think a very damaging effect upon the park, upon the point of use and the point of landscaping.

Q. For what purposes was the park intended to be used principally—as a driving park?

A. It is shown in the act itself to be dedicated to the people of the city and county of St. Louis for their enjoyment forever—that is, a pleasure ground for the people of St. Louis.

Q. Are there drives running through it?

A. Yes, sir; nineteen and three-quarters miles of drives through the park.

Q. What effect would the penetration of the park by railroads at different points have upon the park as a driving park?

A. Up to this time it was apprehended that the road would produce some great danger to persons visiting Forest park, and it was a long time before that public impression was relieved, that they were relieved of the apprehension that horses would be frightened, and hence there is a provision that the road shall be covered over with a cover or protected by trees. During the time I was president of the park it was not thought to be necessary.

Q. How much money has been expended in beautifying the park?

A. $405,000 during my administration; since that time nothing. It remains as it was then.

Q. What does it represent in money to-day?

A. In cash paid, $1,300,000, and, besides that, some contributions made by the city since. The interest on that sum, of course, is to be added. The bonds are thirty-year bonds.

Cross-examination by Mr. BLODGETT:

181 Q. The money expended by the park commissioners was for the payment of the masonry?

A. Yes, sir; and iron-work and flooring.

Q. In the viaduct and culvert?

A. Yes, sir; there are two culverts in the park.

Q. One viaduct?

A. Yes, sir; if you call it a viaduct. There is something—an underground bridge where it runs into the bridge at the eastern end, and there is a bridge under which the road, the principal access to the park, passes.

Q. The carriage road?

A. Yes, sir; there are two pathways which are arches under the principal road.

Q. Now, the expenditures by the park commissioners were in the erection of masonry composing these two arches and the principal viaduct through which the people enter the park. It was in the masonry composing those structures?

A. Yes, sir; there would have been no necessity for them, except for the railroad.

By Mr. ORRICK:

Q. They were made necessary by the railroad?

A. Yes, sir.

By Mr. BLODGETT:

Q. They were for the convenience of persons passing in and out of the park?

A. Yes, sir.

Q. Without the railroad there would have been no necessity for the culverts; they were the entrances for carriages and footmen?

A. Yes, sir.

Q. The commissioners did not pay any part of the cost of grading the road?

A. I think there was some little cost of that which grew out of the sloping of the sides. If it was made forty-two feet wide it was paid for by the railroad, but if it was necessary to carry it beyond
182 that it was to be paid for by the park. Exactly what occurred in that connection I do not remember. Col. Flad will probably be better authority on that subject than I will, although I was there.

Q. And these expenditures were for the purpose of making convenient and safe entrances into the park over the road at one place and under it at another?

A. They were coincident, you know, with the whole work; one depended upon the other. I will say that the railroad company was very considerate in meeting the wishes of the board, and the board gave them privileges, as far as practicable, after they acquired the right, but perhaps there was some small expense on the part of the park on the slope. I do not know about that. It certainly is wider than forty-two feet. They intended to furnish space for a double track. They had only the right for one track and the extension was made for a double track. It was intended to protect the park. It was intended to provide for a contingency to double the capacity of the park—to provide for more trains passing through—and we conceded more ground than was necessary for them—gave them a right of forty-two feet. They had only the right, under the act, to one single passway. It is not named in the act, if you will observe.

By Mr. HOUGH:

Q. This road, I understand, was completed in 1875 or the spring of 1876 through the park?

A. Yes, sir.

Q. That was before the adoption of the scheme and charter?

A. Yes, sir.

Q. Before the city of St Louis had anything to do with the park?

A. Yes, sir; the park was not surrendered to the city, I think, until November, 1877.

Q. It was not judicially determined for some time?

183 A. November, 1877. I was president of the park for three years. I remember that.

By Mr. BLODGETT:

Q. You say that at the eastern end of the park the railroad enters there?

A. At Duncan's subdivision.

Q. Through the tunnel?

A. It was intended for a tunnel, but for the accommodation of the road it was made a bridge.

Q. The railroad enters through a deep cut that is bridged over?

A. Yes, sir.

Q. It was mutually arranged between the park commissioners and the railroad company, was it not, that they should fix the grade of the road at that point as it now is?

A. Yes, sir.

Q. And that in consideration of that the park commissioners should contribute something towards the structure?

A. Yes, sir; that was the arrangement, but not exactly in that view. It became a necessity after the excavation was made which suited all the parties—it became a necessity to construct a bridge.

Q. And the expenditures by the commissioners were in the construction of the bridge?

A. Yes, sir; but in consequence of the way the road run in—the point they selected.

Q. The point as agreed on by the park commissioners and the railroad?

A. Yes, sir.

Q. And the grade was arrived at?

A. Yes, sir; all the points in issue were settled by the contract.

Q. And they went on then west and north or in a northwesterly direction from the point where the road enters the park and it became necessary to construct the line on an embankment?

A. Yes, sir.

184 Q. And then the plan contemplated an embankment and a carriage-way underneath the railroad track?

A. Yes, sir.

Q. And it was for that purpose of having a carriage-way—a neat-looking structure there—that the park commissioners made the expenditure?

A. Yes, sir; that was the motive.

Q. At some intermediate point a footway or arch was provided under the track?

A. It was supposed there would be passages under the road and where necessary they were provided for by the park, except the con-

tribution made by the Wabash road at the point on the map indicated by the narrow-gauge railroad depot. If you will look at the map you will see it is there.

Q. It was the cost of the passage-way over and under the track towards which the park commissioners made the contribution?

A. Yes, sir.

Redirect examination by Mr. ORRICK:

Q. I understood you to say that the construction of this road made these expenditures necessary by the board?

A. Yes, sir.

Q. There is a deep cut towards the eastern end of the park and this cut was walled straight up on each side for several hundred feet?

A. Several hundred feet in length; about twenty-five feet high.

Q. And between those walls is the track of the road?

A. A double track at that point.

Q. Who paid for those walls?

A. The park board.

By Mr. BLODGETT:

Q. Not outside of the park?

A. Inside of the park.

By Mr. ORRICK:

185 Q. Now, as to the entrance of the park, the arch under the bridge, I understand you to say the park commissioners built that bridge?

A. Yes, sir.

Q. And the road is now running over that bridge?

A. Yes, sir. It cost $17,000.

Q. The main entrance of the park is right under that bridge that cost $17,000, you say?

A. Yes, sir.

Q. Now, if the railroad had not been constructed would it have been necessary to have built the bridge at that place?

A. At the time the agreement was made it was not known what would be the policy of the road in complying with the contract.

Q. Irrespective of any railroad in the park, would it have been necessary for the park to have built the bridge at that place?

A. At the entrance; no, sir.

Q. It is entirely level ground?

A. Just a slope into the park.

By Mr. BLODGETT:

Q. Do you recollect who owned that part of the park, from whom you acquired that part of the park through which the road is constructed?

A. It belonged to the representatives originally of Glasgow. It passed into the owners of the lots known as Donahoe and Gast—the owners of the property then known as Duncan's subdivision—and

was then divided into lots. The property beyond that running through the park belonged to W. D. Griswold, all the way from where it entered to where it left the park. There was a little piece of property there which the railroad passes through that belonged to Robert, John, or Levin Baker, a few acres, on which there was an apple orchard. Before it reached the park it passed through Duncan's subdivision, and then it entered property that belonged
186 to the Lindell heirs, the Bakers, with a little house on it, and then when it left that it went through the Griswold property. Griswold had fifty acres there.

J. B. VANDYNE, sworn for the intervenor, testified as follows:

Direct examination by Mr. ORRICK:

Q. Where do you live?

A. At Sedalia, Missouri.

Q. What is your age?

A. Fifty-four.

Q. Please state what connection you have had, if any, with railroads or the operation thereof.

A. I have been in the business since 1855.

Q. What position have you had in connection with railroads?

A. I was — in 1861, I think, and since then I have been superintendent.

Q. I believe you were at one time superintendent of the Union depot in the city of St. Louis?

A. Yes, sir.

Q. Suppose there is a contract by which one railroad has agreed to let the cars of another pass over its tracks for a fair and equitable compensation, on what basis or how would the amount of such fair and equitable compensation be arrived at?

A. The wheelage basis is the one ordinarily selected.

Q. What do you mean by wheelage basis? How would you arrive at the amount of that basis? What would you do first?

A. I would take the cost of the road.

Q. Between the points to be used?

A. Yes, sir.

Q. What would you do next?

A. Take the maintenance of the way, the superintendence, etc.

Q. Suppose you had arrived at the cost, what would you do next in order to arrive at the cost per annum?

A. I would keep a correct account of the number of cars and engines passing over it.

187 Q. Railroads usually do that?

A. Yes, sir.

Q. How would you arrive at the gross amount per annum that ought to be paid?

A. Take the number of cars and engines each road would run over it and then divide the sum of expenses and interest account by the number of cars and engines the roads handle, and then,

having a separate statement of each road, we could allot each its proportion to pay.

Q. What rate of interest would be fair and equitable on the cost of the road?

A. Whatever their bonds generally run—six or seven per cent.

Q. Do you know about what the cost of maintenance per mile would be per year on such a piece of road as that between Forest park and the Union depot?

A. I am not familiar with the track.

Q. Suppose it is an average track.

A. I should think one section gang, six or seven men, would keep it in repair; about $200 a month for wages.

Q. How many miles of road does one gang of men take care of?

A. Out on the line five or six men to a section of six miles.

Q. Can you state what the cost of maintenance per annum would be, taking one year with another, including labor and everything—I mean the cost of maintenance of the track?

A. This piece of road I am not familiar with, but, starting new, there would be very little expense.

Q. A new road, how much would it be?

A. I should say $20 or $25 a mile would be sufficient a month.

Q. As the road gets older it would increase?

A. Yes, sir.

Q. Give the average through a series of years what it would be.

188 A. It depreciates as the traffic, of course, increases on it. It depends on the number of cars you run over it. The life of a tie is about seven years, and the iron would wear out according to the number of engines and cars you hauled over it. The more you handle over it the more men you would require to take care of it.

Q. You would consider $400 or $500 a mile sufficient for renewals through a series of years?

A. Steel rail would have to come out once in ten years and the ties once in seven years.

Q. I am stating the amount to cover everything—renewals for several years—seven years or ten years, as the case may be.

A. It is pretty hard to get at that; $600 or $700 a mile, renewals and all. That is merely a rough guess. I am not familiar with the road at all.

Cross-examination by Mr. PRIEST:

Q. Have you any extended experience concerning the use of tracks in the manner specified in Mr. Orrick's question?

A. Yes, sir; I have had that to do very often.

Q. At any other point than at St. Louis?

A. Yes, sir.

Q. In connection with any other road than the tracks belonging to the Union Depot Railroad Company?

A. Yes, sir; the Nashville & Decatur and the Missouri Pacific and the Nashville & Decatur at a junction where they cross a bridge

over the Tennessee. The superintendents are required to make out a statement of the wheelage and what the expense would be to the manager.

Q. Simply for the purpose of keeping their accounts?

A. Yes, sir; and settling on the basis that each shall pay for the use of tracks.

Q. At these connections of which you have spoken here the rental was in the sum gross?

A. Yes, sir.

189 Q. Without reference to wheelage?

A. Yes, sir; after they heard our report the amounts were generally cut down by the manager and made in a lump so much a month without regard to the wheelage afterwards.

Q. The contract with reference to a road depends upon the circumstances and conditions of the contracting parties—there is no general rule or custom or usage in regard to it?

A. It is agreed between the roads always.

Q. It is a matter of contract and not one of usage?

A. They use the wheelage basis to arrive at conclusions so as to come as near as possible to what is right and just.

Q. That is simply a fact they consider in determining the compensation?

A. Yes, sir.

Q. Or in making a contract; but as a rule is — not the contract itself?

A. Not always; no, sir.

Q. Of course the necessity of repairs depends upon the usage of the track, the condition of the territory through which it passes?

A. Yes, sir.

Q. The ground on which it is located—some parts of tracks are more difficult to maintain and more expensive in maintaining than others?

A. Yes, sir.

Q. You have never examined the track of the Wabash through Forest park and from there to the city at Eighteenth street?

A. Never.

Q. You know nothing about the track?

A. The physical condition I know nothing about.

Q. For the use of the Union depot tracks at St. Louis, what is the per cent. upon the valuation of the property charged to other roads?

Counsel for the intervenor objects to the question.

190 A. The Union depot property is owned by a syndicate of gentlemen, and they charge the roads using the tracks a certain interest—ten per cent.

Q. That is, ten per cent. on the value of the property, not on the basis of wheelage?

A. Yes, sir; the roads are charged with the number of cars they run, and if they are cleaned that is extra, of course.

Q. Where the use of such tracks comprehends the terminal ad-

vantages of a road those are charged for, of course, taken into consideration?

A. You are speaking of the Union depot passenger department.

Counsel for the intervenor objects to this as irrelevant. Objection sustained.

Q. As superintendent of a railway did you ever conduct to final consummation a contract on the part of one railway company for the joint use of the track of another at a terminal point?

A. No, sir. That is determined by the heads of the roads finally. I have made reports to them. I have never made a contract myself with roads for such privileges, but I have made reports on them frequently for the manager or president, and by the manager or president the contract was made.

By Mr. ORRICK:

Q. On what basis?

A. On wheelage, generally, and very often a compromise is made between them so as to make it less; most always.

By Mr. PRIEST:

Q. Of course you say this matter altogether depends on the circumstances and the situation of the two roads and the amount of track to be used?

A. Yes, sir.

Q. And the advantages to be spared by the road using the track proposed to be used by another coming in?

191 A. The road doing the most business would pay the most expenses, and that would be determined by the number of cars hauled. The train sheets of all roads show that.

Q. The contracts all depend upon the circumstances of the parties making the contract—the necessity of the one to acquire the right of way over the track of another, the joint use of the track, and the ability of the company owning the road to spare its track?

A. Yes, sir.

Q. It depends on these circumstances?

A. Yes, sir; there are similar cases to the one I referred to awhile ago. The Fort Worth road stops four miles short and goes over the expensive bridge over Trinity river, and of course the cost of the road-bed and everything is made up—all of the expense incurred in building the railroad, bridge, and everything—and all the maintenance of way after it is built is divided between the roads according to the number of engines and cars that run over it. That is the general basis on which we run. There is a compromise generally made between the parties at the home office. At Hannibal there is a similar case there. The Wabash use the Missouri Pacific tracks, and we keep a regular wheelage account of all the cars handled in the yard. One company furnishes two switch-engines and the other two, so that the entire expense of the station is alloted according to the cars each company has in the station.

By the MASTER:

Q. Is that upon the basis of the cost of construction or maintenance?

A. No; it is simply the wheelage basis for handling cars in the yard.

Redirect examination by Mr. ORRICK:

192 Q. You spoke of four miles of track being used in Texas. From where to where?

A. From Ft. Worth to Hodge.

Q. Who uses that four miles?

A. The Fort Worth and Denver.

Q. Who owns the four miles?

A. The T. P., and it is leased by the Missouri Pacific.

Q. Is Fort Worth quite a large place?

A. There are about twenty-five thousand people there.

Q. Now, on what terms does that road use that four miles from Hodge to Fort Worth?

A. I think they pay $500 a month.

Q. Was it any time on a wheelage basis?

A. We tried to get it that way at one time. That is the reason I spoke of having the matter in charge.

Q. What was done?

A. We settled the cost at $1,500 a month, and they compromised it in New York or here and made it $500 a month.

Q. In the first instance how did you arrive at the $1,500?

A. We took the cost of construction, the right of way, and everything pertaining to the road and estimated the number of cars and engines that went over it in a month. Took a month, and took the train sheets to see how many cars and engines went over, and divided the whole amount of expense and everything by the whole number of cars and engines and charged them their proportion.

Q. Where there is to be a user of a track on a fair and equitable basis do you know of any other than a wheelage basis by which you could arrive at it?

A. I see no other way of getting at the true amount that each road should pay.

193 Q. As the wheelage increases, the compensation increases?

A. Yes, sir.

By the MASTER:

Q. You stated that the basis was the cost of construction and maintenance, and a proper division would be on a wheelage basis. You would not consider that a uniform rule as to any portion of a track, would you?

A. I should consider that the rule for the track that the two parties run over.

Q. You would not consider the same basis of cost of construction and maintenance for the four miles running through Forest park into the Union depot or Eighteenth street, at St. Louis, at the end

of the track as you would consider four miles of a road that did not have that connection?

A. It is more valuable, I know, and must be estimated according to the cost of the road.

Q. And an additional element is the value of the track itself?

A. Yes, sir; that is what I think.

CHARLES H. SHARMAN, sworn for intervenor, testifies as follows:

Direct examination by Mr. ORRICK:

Q. What is your business?

A. I am superintendent of the Illinois & St. Louis railroad.

Q. That road is located where?

A. In Illinois.

Q. Where does it come in—at East St. Louis?

A. It comes in at East St. Louis or just south of East St. Louis.

Q. How long is that road?

A. The main line is between Belleville and East St. Louis, about fifteen miles.

Q. Does your company own any tracks in the city of East
194 St. Louis at the terminus of those roads there—property, and so forth?

A. We have some tracks in East St. Louis.

Q. Covering how much ground?

A. The tracks running in the city of East St. Louis cover about three-quarters of a mile.

Q. How long have you had charge or been superintendent of or connected with that road?

A. Since January, 1878.

Q. Do you move a good many cars on your road?

A. Yes, sir.

Q. You do a large business, I suppose?

A. Principally coal business.

Q. About how many cars per month do you move on your road the year round?

A. We will average, probably, sixty cars a day—that is, loaded cars.

Q. From your experience in railroad business and transportation, I will ask you whether you can state what would be a fair and equitable compensation to a road for the use of it where there is a contract existing whereby one railroad may use the right of way of another railroad.

Mr. Hough, of counsel for defendants, suggests that counsel for intervenor should show whether the witness is qualified to answer the question.

Q. Well, what do you know about the use of other roads—the termini of rights of way of other roads? Do you know about that and about what persons have been willing to do usually within your knowledge?

A. We were at one time the lessees of the Venice and Carondelet

railway—the company is now the lessee of that railway—and in the operation of that we afford track facilities to other railroads.

195 We do a switching business, move cars for other roads, and we also use a part of the Conlogue track under agreement with the Vandalia line, going into the relay depot at East St. Louis.

Q. On what basis are those tracks used?

A. We are now using a portion of the Vandalia track to the relay depot, about 600 feet. Do you want me to state what we pay for the use of that?

Q. Yes.

A. We pay $125 a month.

Q. How about your own road; how about the use of that? State whether you have made any arrangement or propose to make any out at Belleville or East St. Louis.

A. We had sort of propositions with roads contemplating using our tracks from Belleville. We have never, however, made any agreement with any road.

Q. What are you willing to do as being fair?

Defendants' counsel objects to the question.

Q. I will not press the question. Now, Mr. Sharman, suppose one road by a contract has the right to use the tracks of another between certain designated points for a fair and equitable compensation. How would you arrive at that amount for the use of such right of way? What would be a fair and equitable mode of arriving at it where the parties could not agree among themselves?

A. What would be a fair compensation for the use of a piece of track?

Q. Yes, sir; where the parties could not agree and the basis was to be a fair and equitable basis. How would you arrive at it?

A. There is one mode of arriving at it that strikes me as being fair in regard to the value of the tracks to be used jointly; that is in relation to what it costs, and then agree upon a percentage that should be paid on that. Add that amount onto the maintenance

196 of the track and prorate that.

Q. What would be a fair percentage on the cost?

A. Well, six per cent., I presume. That is the average percentage now.

Q. What proportion would each one pay of that?

A. I should divide that, perhaps, on the basis of wheelage. That would be fair, I think.

Q. What would be about a fair sum for the maintenance per annum of each mile of track, say, in ordinary condition on a trunk line, say, such as the Wabash is, from the north line of the park to the Union depot?

A. That is a variable quantity. It depends, of course, on the price of labor and the price of material.

Q. Name an outside figure.

A. I should think it would vary from four to eight hundred dollars per mile.

Q. Per annum?

A. Per annum. On the track labor alone usually I think it is considered a man to the mile keeps the track in good shape as far as labor is concerned. That depends upon the price of labor; and so with material. The life of a tie is considered to be about seven or eight years—an oak tie; and if it had to be renewed it would depend on the cost price of the material. The life of the rail would depend largely on the amount of the traffic. It would vary with different lines.

By Mr. DYER:

Q. Let me ask you one question. Suppose that the right existed in the St. Louis, Kansas City & Colorado Railroad Company to run over the line of the Wabash road from the north line of Forest park to Eighteenth street in this city, and that the two parties—the Wabash road on the one hand and the St. Louis, Kansas City &
197 Colorado upon the other—cannot agree as to a fair and equitable compensation to be paid to the Wabash for the use of its track, and that there is a contract for a fair and equitable compensation to be paid for the use of it. Can you suggest to the court any more equitable way of arriving at that compensation than upon the wheelage basis?

A. No; I cannot say that I could suggest anything more equitable.

Cross-examination by Mr. PRIEST:

Q. To what extent have you had experience as superintendent of railways?

A. I have been in charge of the Illinois and East St. Louis railroad since January, 1878, and I am now in charge of that road.

Q. Is that all?

A. That is the amount of my connection with this line. I was for a short time in charge of Wells' road, in 1876, previous to that.

By Mr. BLODGETT:

Q. That is all in St. Louis county, Wells' road?

A. Yes, sir; previous to that my connection with railroads was in the capacity of civil engineer.

By Mr. PRIEST:

Q. This Illinois and East St. Louis railroad, what is the extent of that line?

A. Its main line is now to Belleville. It is fifteen miles from East St. Louis to Belleville. We are also the lessees of the Venice and Carondelet railway, which is about eleven miles long.

Q. Making in all about twenty-six miles of railroad that you have under your charge?

A. Yes, sir.

Q. What lines, if any, of railway use jointly with the Illinois and St. Louis any part of its line?

A. The East St. Louis Connecting railway uses a portion of our line.

Q. How much of it?

A. They use about a mile or a mile and a half of our line.

198 Q. Is the compensation that you receive from the East St. Louis Connecting railway based upon wheelage?

A. We prorate the expense—divide the expense of maintaining that portion of the track. It is not on wheelage. It is not practicable to get the wheelage, because we are doing a switching business there, and we could not very well keep a wheelage account.

Q. What do they pay—the East St. Louis Connecting railway?

A. That is part of the terms of the lease of the Venice and Carondelet Belt railway.

By Mr. ORRICK:

Q. Then they have the whole road?

A. Yes, sir; the Venice and Carondelet railway, and according to the terms of the lease they use jointly with the Illinois and St. Louis railway a portion of this track at the terminus.

By Mr. PRIEST:

Q. What do they pay for that?

Counsel for intervenor objects to the question as incompetent.

The MASTER: I think you asked him what they paid for it, and he said $125 a month.

The WITNESS: That was in reference to the Conlogue line. We pay another company for that.

By Mr. PRIEST:

Q. The Illinois and St. Louis Railroad Company has a lease upon a part of the Venice and Carondelet railway, has it?

A. Yes, sir; it leases the whole of the Venice and Carondelet railway.

Q. At the time the Illinois and St. Louis Railway Company acquired the lease of the Venice and Carondelet Railway

199 Company, the Venice and Carondelet Railway Company had an agreement with the East St. Louis Connecting railway?

A. No, sir; that is not it exactly. The Illinois and St. Louis Railway Company really constructed the Venice and Carondelet railway, and after the construction and operation of that road for a certain length of time they sub-leased the Venice and Carondelet railway to the East St. Louis Connecting railway or the Wiggins Ferry Company in connection with certain car transfer privileges, and part of the terms of that lease was that they should have the use of certain tracks of the Illinois and St. Louis railroad at their yard—the terminus.

Q. Was the compensation named?

A. The compensation was fixed in the lease.

Q. What is that compensation?

A. That was included in the whole amount that was paid.

Q. And you say there was no compensation fixed for the use of this part of the track in that lease?

A. No, sir; but there was an agreement in regard to the mainte-

nance of it—how this portion of the joint track should be maintained. That agreement was that each company should pay one-half of the maintenance—of the actual cost of maintenance. It only referred to the maintenance.

Q. Do you know what value was fixed on this use of that right of way in estimating the rent to be paid in the lease?

A. There was nothing specified as to the value of that. It was a part of the system. It was the only way they could use the system of tracks. The only way was to use this portion—that is, the Venice and Carondelet railway joined the Illinois and St. Louis track some distance (about a mile) from East St. Louis, and consequently
200 the Venice and Carondelet railway had to use this portion of the Illinois and St. Louis railway, and that made it the joint track.

By Mr. HOUGH:

Q. Did this Venice and Carondelet railway simply connect with the Illinois and St. Louis railway at this point, or did they, the Venice and Carondelet railway, own any portion of the right of way from the point of connection to the depot?

A. No, sir; that was the Illinois and St. Louis railway's.

Q. Their track?

A. Yes, sir.

Q. When they leased the Venice and Carondelet railway they did not lease this mile with it. It was their only way of getting in, but it was not a part of the lease. They did not lease the mile?

A. Not exactly. They had the privilege of running over that portion of the track.

Q. Was there any estimate made of the value of that privilege?

A. No, sir; no estimate at all.

Q. It was included in the lease just as if it were a part of the Venice and Carondelet railway?

A. Yes, sir; in order to make the Venice and Carondelet railway complete they had to use a portion of those tracks.

By Mr. PRIEST:

Q. The Wells' road is the St. Louis Narrow Gauge railroad?

A. Yes, sir; at that time it was known as the West End Narrow Gauge railroad.

Q. What is the extent of that road?

A. When I was first connected with it it went to the St. Charles Rock road. I afterwards constructed it to Normandy, and it was running there when I left it. It is eight miles to Normandy and sixteen miles to Florissant, I believe.

201 Q. Did it connect with any other railway, or did any other railway use the track of it?

A. No, sir; not then.

Q. I believe you stated that the Illinois & St. Louis Railway Company used six hundred feet of the Vandalia road to make a connection with the relay depot at East St. Louis?

A. Yes, sir.

Q. Do you under that agreement run all your cars and trains over that portion of the Vandalia line?
A. We run all our passenger trains over it.
Q. Only your passenger cars?
A. Yes, sir.
Q. What do you pay for that six hundred feet?
A. $125 a month.
Q. How many passenger trains have you?
A. Four each way a day, besides extra trains.
Q. No freight at all?
A. No freight.

Redirect examination by Mr. ORRICK:

Q. Was there a contract between you and the Vandalia road whereby it had agreed to allow you to use that track for a fair and equitable compensation?
A. The agreement was first made between myself and Mr. Conlogue. It was built by him and afterwards came under the control of the Vandalia. My arrangement with him was based on this cost of maintenance, and that amounted to about thirty dollars per month the way I figured it..
Q. That is on the wheelage basis?
A. Yes, sir.
Q. How long did that exist between you and Mr. Conlogue?
A. Until the Vandalia took possession of it.
Q. Now, what I ask is, when the Vandalia took possession of it at that time did you have any contract with the Vandalia line whereby you could compel it to let you use those tracks for
202 a fair and equitable compensation?
A. No, sir; my agreement with Mr. Conlogue was only a verbal one; we had no written agreement.

By the MASTER:

Q. What do I understand you to mean by wheelage?
A. Well, the number of cars. For instance, if two roads were using a piece of line jointly, the number of cars that one line ran over that portion in a day or a specified time, as compared with the number of cars which the other road ran over it in the same time—that would be called wheelage.
Q. Suppose one road owned the track subject to the right of the other road to use it in arriving at the basis of a reasonable rental for the use of it what would be the elements that you would take into consideration?
A. I should take the element of the cost of the track, the constructing of that piece of line, and the cost of maintaining it to arrive at a fair valuation for the use, and then the relative use that each road put that track to—that is, the amount of traffic that each one ran over that piece of line would measure the use it was to each.

By Mr. DYER:

Q. If I understand you right, what you say is this: If the track you propose to use costs $100,000 and the cost per year of maintaining it was $5,000, that would make $105,000; then you would add the interest on $100,000 at six per cent., which would be six thousand dollars, to $5,000, the cost per year of maintenance, and that would make $11,000, and then you would divide the $11,000 between the roads using it in proportion to the number of cars of each running over it. Is that what you mean?

A. Yes, sir.

203 Q. Is there any other way of arriving at it where parties cannot agree among themselves?

A. I know of no fairer way than that.

Q. You would not require a road that used one-tenth to pay as much as one that used the track nine-tenths?

A. No, sir.

By Mr. HOUGH:

Q. Would it be entirely fair to take the cost of construction of the road instead of the value of that road at the time the third party comes in to claim a right to run over it? Ought not the value of the road instead of the original cost of the road be the criterion or basis of the calculation? For instance, your right of way increased in value very much, you may have had the only possible way of getting into the city—wouldn't those elements enter into the value of the property that the other party was to use?

A. I should think so. To some extent, yes. The right of way now would be perhaps more valuable than ten years ago.

Q. A lot that was worth five dollars a foot then might be worth one hundred dollars a foot now?

A. Possibly, yes.

Q. So that it would be the value of the road at the time the party comes to exercise his right, instead of the original cost of the road?

A. I should think so.

By Mr. DYER:

Q. Suppose at the time the right of way was acquired the right to run over that line of railway was given by a contract to this company or any other company, the St. Louis, Kansas City & Colorado, call it; suppose at the time that was done the right to run over it was had; suppose the Wabash railroad had the use of that

204 road without interference or without having it used by this company or any other company, would you say that the correct basis would be in fixing a fair compensation to be paid to the Wabash railroad upon the cost of that road or upon the increased value of that road as it might be now with the land it occupies?

Mr. Hough, of the defendants' counsel, objects to the question for the reason that the hypothetical statement contained in it does not conform to the facts; that the petitioner here had no existence

when the right of way was acquired, and has been in existence only two years.

Q. Suppose at the time, say in 1876, the Wabash railroad acquired the right of way through Forest park and thence on to Eighteenth street, in the city of St. Louis, subject to the right of any railroad to run over the line into the city of St. Louis, and suppose that road came into existence last year or two years ago and demanded to go over the road in pursuance of that original contract, would you fix the basis of compensation on the original cost of that road, the use of which the Wabash had exclusively, or would you fix it upon the increased value of real estate over which that Wabash line run?

A. I should fix it on the original cost.

Q. Why?

A. Under the conditions you have stated I should think that would be the understanding.

By Mr. HOUGH:

Q. If a railroad should organize for the purpose of availing itself of an agreement on the part of the Wabash that any other railway might use its track—if a railway organizes itself for the purpose of taking advantage of a stipulation ten years after the stipulation is entered into, ought that railroad to have the use of that property on the original cost of it or on the valuation of it at the time they organized for the purpose? Which would be equitable?

205

A. If I understand the case as put, the Wabash, when it acquired this right, entered into an agreement to allow the use of this right of way to another road, when the time should come, on the condition that it was granted that right at that time itself, so that whenever the conditions come along to meet the requirements of the contract I should say it should be based on the cost of the road.

Q. It says any road hereafter organized may have the right to run over the track. When you come to estimate the value of the use of that track, if a railroad company is organized for taking advantage of that stipulation and comes to use the property of the Wabash Company, is not the right that this newly organized company gets to be based on the valuation of the property it seeks to use at the time rather than what it originally cost the parties?

A. I presume so. If it is considered as going through a new section of country and condemning the right of way, then it would have to pay the increased value of the property.

Q. Ought it not to pay all the value of the property at the time of its organization?

A. If it comes along as a road to condemn property and condems the property of the Wabash they would have to take it at its present value.

By Mr. PRIEST:

Q. Your answer to Col. Dyer's question is based on your construction of the contract?

A. Yes, sir; I say if there is a contract to that effect the contract should be carried out. In event there is no contract and the
206 road goes through a new country and seeks to condemn the right of way, of course the value of it is the present value, not the value of the past.

Counsel for the intervenor offers in evidence a deed made from the St. Louis County railroad to the St. Louis, Kansas City & Northern railroad, dated August 11th, 1875, recorded in Book 526, page 324 and following, in the office of the recorder of deeds (marked "Exhibit C").

Counsel for the intervenor also offers in connection with the above deed chart A, which was offered this morning as the plat referred to in the deed.

Counsel for the receivers admit that the St. Louis County railroad built no track or railroad between Eighteenth street and the north line of Forest park, where the Wabash, St. Louis & Pacific railroad now enters the park from the west; that they never built or operated any railroad at all, and that they failed and refused to pay on demand to the St. Louis, Kansas City & Northern railway or to the Wabash, St. Louis & Pacific railway any part of the cost of the construction of its railroad through the park or elsewhere.

Counsel for the intervenor also offers in evidence a time-card of the Wabash, St. Louis & Pacific railway, entitled "Wabash, St. Louis & Pacific railway, Solon Humphreys and Thomas E. Tutt, receivers. Western Division time-table No. 10; second edition. For the government and information of employés only. To take effect Sunday, May 30th, 1886, six o'clock a. m.," and same was marked Exhibit D.

(Here follows time-card marked p. 206.)

207 At this point the further hearing of the case was adjourned until 10 a. m., July 17th, 1886.

Pursuant to adjournment, as before stated, on July 17th, 1886, the hearing of the case was resumed.

Present: Messrs. Blodgett, Hough, and Priest, solicitors for the receivers, and Messrs. Orrick and Dyer, solicitors for the intervenor.

Counsel for the intervenor offers in evidence the articles of consolidation of the St. Louis, Kansas City & Northern Railway Company with other companies made on November 11th, 1879, in explanation of the allegation of the bill in respect to the acquisition of the property of the St. Louis, Kansas City & Northern Railway Company by the Wabash, St. Louis & Pacific Railway Company.

Counsel for the receivers object to them as irrelevant and incompetent, they having admitted on yesterday the allegation of the bill referred to.

The master overrules the objection, stating to counsel for receivers that they can withdraw the admission, which they refuse to do and except to the ruling.

S. P. EMERSON, recalled for the intervenor, testifies as follows:

Direct examination by Mr. ORRICK:

Q. As a railroad man, if the St. Louis, Kansas City & Colorado railroad uses this right of way, state under what rules and regulations they ought to be subject to in order to practically use it.

A. They ought to be subject to the rules of the Wabash railway when on their track. They could not have two sets of rules.

208 Q. That is usual in cases of this kind?

A. Yes, sir.

Q. Have you examined the time-table of the Wabash road with a view of ascertaining to what use the tracks between the north line of the park and Eighteenth street is now put?

A. I have.

Q. At what hour the track is used and how many trains pass over it during the twenty-four hours?

A. Yes, sir; I have.

Q. Please state to the master whether it is practicable for the trains of the St. Louis, Kansas City and Colorado Railroad Company to go over that track between the north line of the park and Eighteenth street at times, when, according to the time-table, the track is not being used by the Wabash or the St. Louis, Keokuk and Northwestern.

A. There would be no difficulty in it. There would be no conflict.

Q. Will you please explain to the master how there would be no conflict? Have you a diagram there?

A. I have a diagram showing the trains of the Wabash railway as they now run by the time-card.

Q. Please explain to the master that diagram.

A. These vertical lines are five-minute lines and these vertical lines are fifteen, thirty, forty-five minute, and hour lines. These heavy, black vertical lines are hour lines and the intermediate lighter lines are five-minute lines. The horizontal lines are the distances between stations, according to a fixed scale.

By the MASTER:

Q. What are the figures opposite?

A. The distances from the center of the Union depot to the stations.

Q. In miles and fractions?

A. Miles, tenths and hundredths. The diagonal lines be-

209 tween Union depot and the point about midway between Forsyth junction and Rosedale Heights indicate the trains of the Wabash railway, and the dotted lines from the Union depot to West Lake indicate the trains of the St. Louis, Kansas City and Colorado road. The position of the diagonal lines will show whether our trains interfere with their trains. We propose to leave the Union depot at six o'clock in the morning and arrive at the lake at seven. We do not run against or in conflict with any one of their trains, as shown by the diagram.

By Mr. ORRICK:

Q. What time will there be between their first train and your first train in the morning according to the present time-table?

A. Fifteen minutes.

Q. In the starting time?

A. This train is coming in. They would be nearer together at the other end than at the Union depot. Here is the first train going out at 8.20, and we leave at six, two hours and twenty minutes ahead of the first train. We arrive at West Lake at seven o'clock in the morning, leaving there at eight to return to St. Louis, arriving at the Union depot at nine o'clock in the forenoon.

Q. What train have they coming in at that time?

A. There we would miss at Forsyth junction one of their outgoing trains five minutes. It would pass going west five minutes before we arrived there; that is the nearest conjunction; then we would leave at 9.30 going west; that is a slow train, a mixed train, and it takes an hour and a half, leaving at 9.30 and arriving at the lake at eleven o'clock. Returning, we would leave the lake at 12.30 and get to the Union depot at two o'clock in the afternoon.

210 Q. Would that interfere with any of their trains?

A. No, sir; we would then leave the Union depot going west at three o'clock, arriving at the lake at four p. m. Returning, we would leave the lake at seven o'clock p. m. and arrive at Union depot at eight.

Q. How many trains a day is that?

A. Three trains each way a day. The lines give the number of trains they have on their time-card.

Q. That would be the number of trains the Colorado Company would require?

A. For awhile.

Q. Would there be opportunity for other trains, according to the present time-card of the Wabash road?

A. Yes, sir; we could put on a great many trains without interfering at all.

Q. These times of departing from St. Louis and arriving at St. Louis that you suggested for the trains on the St. Louis, Kansas City and Colorado road are not absolutely fixed, as I understand?

A. This is for illustration only. We might want to vary from the time.

Q. You could vary it at other times if deemed advisable?

A. Yes, sir; they might change their time-card, and we should always have to fit our trains to their time-card. We could not run counter to their trains. We would have to be governed by their time-card.

Q. When they change we would have to change to accommodate the new time-table?

A. Those are about the hours I thought would make us the most money, leaving early in the morning.

Q. How many cars, probably, would be contained in the trains

that would be run by the St. Louis, Kansas City & Colorado, so far as you can estimate from your knowledge of the business?

211 A. I think our regular passenger trains would have three cars. Of course we would hope to have more. The more cars we haul the better for us. The train leaving at 9:30 would be a mixed train, and we would haul out all our supplies, and it might have twenty-four or thirty cars. We would expect to get out our construction material and any paying freight that might offer itself. That would be a paying train.

Q. The St. Louis, Keokuk & Northwestern runs over this track now?

A. Yes, sir; from the Union depot to St. Peter's.

Q. Do you know under what regulations they operate their trains?

A. I do not know what rules. That is the rule I suppose (referring to the time-card).

Q. It is impracticable to operate any other way?

A. Yes, sir; they must be governed by the Wabash. One or the other must control.

By Mr. PRIEST:

Q. You do not mean to say that the St. Louis, Keokuk & Northwestern operates its trains over our road?

A. I say they pass the trains over it; they go over it.

By Mr. ORRICK:

Q. They run from St. Peter's?

A. They pass from here to St. Peter's and back.

By Mr. PRIEST:

Q. Is it not a fact that the Wabash receive their cars at St. Peter's and take them over the road?

A. I do not know. I have been on the trains.

Counsel for the intervenor offers the plat produced by the witness, and it is marked Exhibit "E."

Cross-examination by Mr. BLODGETT:

Q. Where does the line of the St. Louis, Kansas City & Colorado railroad connect with the Wabash?

212 Counsel for the intervenor objects to this as having been gone into. Objection overruled.

A. At a point on the Wabash thirty-three hundred and twenty-five feet west of the west line of Union avenue.

Q. Then it is 3,300 feet west of where the Wabash road emerges from the north line of the park?

A. A little more than that. It is 3,325 feet west of the west line of Union avenue. It would be 3,647 feet west of the point where the Wabash emerges from the north line of the park.

Q. Have you any railroad any nearer to the north line of the park than 3,600 feet?

A. No, sir.

Q. Have you any right of way nearer the park than that?

A. Not that I am aware of.

Q. Then, as I understand you, at the present time this petitioner has no railroad connection with the Wabash at the north line of the park?

A. It has not.

By Mr. ORRICK:

Q. How far is the track from the north line of the park?

A. It is in the neighborhood of four hundred feet. I am guessing at this; I do not know exactly; I think it is four hundred feet north of the north line of the park.

By Mr. BLODGETT:

Q. Have you any railroad extending from the terminus down to the park?

A. No, sir.

By the MASTER:

Q. Explain the difference between the two distances, 3,600 and 400 feet. I understood you to say to Mr. Blodgett you only came within 3,600 feet, and to Mr. Orrick four hundred feet.

213 Mr. BLODGETT: It is thirty-six hundred feet from Union avenue.

The WITNESS: The point where we connect with the Wabash railway is 3,647 feet west of where the Wabash railway goes out of the park. The Wabash railway goes out of the park and turns around and goes parallel with the park westward quite a long distance and swings to the right and goes northwest. We connect with it there, 3,647 feet from the park.

By the MASTER:

Q. How far does your right of way and your track come from the point that Col. Blodgett points out as the place the road leaves the park?

A. 3,647 feet.

Q. You have no track or right of way nearer to the point the Wabash enters the park than 3,600 feet?

A. No, sir.

Mr. ORRICK: Our line is located there, right at the junction.

By the MASTER: What did you mean by your figures, given a moment ago, 400 feet? To what did that refer?

A. He asked me another question, about how far that point was north of the park, and I gave him that distance. This is the park extending westward, and the line of the railroad runs nearly with the park further on.

Q. Then you have no road, right of way, or location of any kind nearer to the point where the Wabash enters the park than 3,647 feet?

A. We have a location. I answered we had no railroad.

By Mr. HOUGH:

Q. Have you a right of way there?
A. I do not attend to the right of way.
214 Q. To your knowledge, there is no right of way?
A. I do not know.

By Mr. BLODGETT:

Q. Have you any track?
A. No, sir.
Q. Have you graded any?
A. No, sir; the line is located.

By Mr. HOUGH:

Q. You made a preliminary survey?
A. Yes, sir.
Q. And located the route?
A. Yes, sir.
Q. You do not know of any right of way there?
A. I do not know about that.

By the MASTER:

Q. What point is West Lake on this plat marked Exhibit E?
A. That is Creve Coeur Lake. It is between the lakes.

Counsel for the intervenor offers in evidence a letter written by the intervenor to receivers, dated February 3rd, 1886; a letter dated February 4th, 1886, addressed to Messrs. Noble & Orrick, signed by the receivers, by their agent, James F. How; a letter dated February 5th, 1886, addressed to the receivers, signed by Noble & Orrick; a letter dated May 17, 1886, addressed to James F. How, general agent of the receivers, signed by Noble & Orrick, as attorneys for the St. Louis, Kansas City & Colorado road; a letter dated May 18th, 1886, addressed to Noble & Orrick, attorneys for the St. Louis, Kansas City & Colorado road, signed by James F. How, general agent; a letter dated July 2nd, 1886, addressed to the receivers, signed by Noble & Orrick, attorneys for the St. Louis, Kansas City & Colorado Railroad Company, and a letter dated July 3d, 1886, addressed to
Noble & Orrick, attorneys for the St. Louis, Kansas City &
215 Colorado road, signed by James F. How, general agent, and they are marked respectively Exhibits F 1, 2, 3, 4, 5, and 6.

Intervenor rests.

JOHN C. ORRICK, sworn for the receivers, testified as follows:

Direct examination by Mr. BLODGETT:

Q. Are you the attorney for the petitioner?
A. I am one of them.
Q. Have you had general supervision and charge of their legal business in the State of Missouri?

A. Gen. Noble and myself have had. He is absent.

Q. You are one of the firm of Noble & Orrick, and your firm has been the legal advisers of the petitioner since it began work in the State?

A. I think so.

Q. Do you know or have you, as attorney for that company, any knowledge as to whether the petitioner has acquired any right of way between Forsyth junction and the north line of the park?

A. I do not think the right of way has been actually acquired. There has been some negotiation, and the line of the road extends to Union depot.

Q. It has been located?

A. Yes, sir.

Q. On paper?

A. Yes, sir; that part of it.

Q. It is on paper?

A. Yes, sir.

Q. But the right of way for a line of railroad between Forsyth junction and the park has not as yet been acquired by the petitioner, to your knowledge?

A. No; it is a clear piece of prairie—a piece of road that could be built in four or five days. It is near Union avenue, and it
216 was a question there where it would be best or how to cross the Wabash road when the connection is made at Union avenue. One idea is to cross the Wabash road at Forsyth junction and swing around and come in there, and the idea was that — might be objectionable to the Wabash road and the other to go on the other side, and the hope was all the time that some amicable arrangement could be made whereby they could use Forsyth junction instead of making a junction at Union avenue, where the avenue is being used by wagons and pleasure vehicles, etc.; that it would be better for the public and more for the interest of the Wabash road to have the connection a little north. It was a mere matter of detail, but if that could not be arranged it would be necessary to swing across and run into Union avenue, which could be done in a few days. There are no obstructions at all. It is meadow on either side, level ground, and it is only a matter of two or three days' work. Of course until that matter was determined it was deemed unadvisable to say just which side of the Wabash track we would make the connection at Union avenue, and for that reason it is not built down, but, as we say, it is near there, and it is a matter of only two or three days to make the connection.

By Mr. DYER:

Q. Is there anything else you wish to state?

A. I wish to state this while I am on the stand, that just prior to the 2nd day of July, 1886—I notice this letter of ours to Messrs. Humphreys and Tutt is dated July 2nd, 18 blank—that should be 1886—that a week or two prior to that myself and Col. Emerson and, I think, Mr. Brown called on Col. Talmage with reference to making

an amicable arrangement outside of any contract for the use
217 of the track of the Wabash road between Forsyth junction and Eighteenth street, or the north line of the park, if that was deemed desirable, but the idea was that this whole matter could be settled outside of any papers in the case; that it would be more for the interest of both parties to make some amicable arrangement outside and use the track from Forsyth junction in. It had been suggested to me by Col. Brown that such an arrangement could be made outside with Col. Talmage. At his suggestion I went up with him to see Col. Talmage, and we had a pleasant talk about it, and it did not result in anything, except, I think, Col. Talmage said he would have to get some figures from his traffic man; that he was going away and would return probably Saturday of the next week and then he would see what could be done. That was all of that interview. The whole idea of the interview was of some amicable arrangement outside of any contract in the case with a view of coming to an agreement to use their track from Forsyth junction in. I was not present at any other interview, but another was had, I believe, and I was informed he refused to allow——

Counsel for the receivers objects.

The WITNESS: On information which I obtained as to what they would do we wrote the letter of July 2nd, 1886, which is a formal demand made upon them, I having then been satisfied that no outside or amicable arrangement could be made about anything. This letter was then written, at the request of the company, by us, and in this letter, as your honor will see, we say: (Witness here reads the letters of July 2nd and the reply.) Since that time there has been no communication on the subject with the officers.

218 Q. Prior to the date of July 2d all negotiations then pending were for an amicable arrangement to use the line of railway from Forsyth junction in?

A. Yes, sir; Col. Brown assured me he thought he would be able to arrange with Col. Talmage about it and there would be no trouble about it, and they would fix it up among themselves, and they did not want any lawyers about the business. I never went back, and when that was all off and abandoned, then I opened the formal correspondence, making the demand under the tripartite agreement.

By Mr. PRIEST:

Q. As you conceive the tripartite agreement to be?

A. Yes, sir; under my construction of it. Since that correspondence we have had no communication with them at all on the subject, and soon after the bill was filed.

A. A. TALMAGE, sworn for the receivers, testifies as follows:

Direct examination by Mr. BLODGETT:

Q. What is your occupation, Mr. Talmage?

A. General manager for the receivers of the Wabash, St. Louis & Pacific railway.

Q. As general manager you have charge of all the lines of railway operated by the receivers, have you?

A. I have.

Q. How long have you been engaged in railroading?

A. A little upward of thirty years.

Q. Are you familiar with the right of way and railroad tracks of the Wabash between Forsyth junction and the Union depot in the city of St. Louis?

A. I am.

219 Q. Have you ever had occasion to make any figures with respect to the value of the tracks and the right of way from Forsyth junction down to the Union depot?

Mr. Orrick, of counsel for intervenor, objects to the question as irrelevant. Objection sustained.

Q. Are you familiar with that portion of the railroad track and right of way of the Wabash Company between the north line of the park and the Union depot?

A. I am.

Q. Have you ever examined it with a view of ascertaining its value?

A. I have.

Q. Will you state what you estimated the property as being worth?

Counsel for the intervenor objects to the form of the question.

Q. Well, I will ask you to state what you now consider the property to be worth; go on and state what you have done—you can state how you came to form your opinion.

A. Some time ago, at the request of the C., B. & Q. for an entrance into this city over our tracks, I had our engineer go over the values and cost of the property and get up figures; I went over the same with him, and I consider the value of that property to be between a million and a quarter and a million and a half of dollars, but in estimating at that figure it is based on the property having been purchased some time ago and without the improvements with which a similar right of way parallel to this would be burdened. In other words, a right of way parallel to this from the north line of the park into the city would destroy a good deal of valuable property, and that would add to the cost, probably, of a similar right of way and a track with the same facilities that the Wabash possesses now.

220 Q. What would be the value of the 3,600 or 3,700 feet from the north line of the park up to Forsyth junction?

Mr. Orrick, of counsel for intervenor, objects to the question as irrelevant. Objection overruled, the master stating that the testimony may be competent to show the nature of the ground at Forsyth junction and the park over which this road expects to build its line.

A. Very much less per mile than that portion of the line this side of the park, from the fact that the road runs through what we call farm lands that can be purchased by the acre beyond the park, whereas this side of the park it is mostly through town lots that are purchased at a very much higher valuation.

Q. Now, is the same true of the line from Forsyth junction on to Ferguson?

A. Yes, sir; the same is true, and even to a greater extent; as you go towards Ferguson the land gets cheaper per acre.

Q. What would you consider a fair valuation of the right of way and superstructure of the Wabash railway from the north line of the park to the Union depot, with such of its appurtenances as are necessary to operate it as a railroad in the city of St. Louis?

Counsel for the intervenor objects to the question, as intervenor is not asking for the appurtenances.

The MASTER: What do you mean by appurtenances?

Mr. BLODGETT: I mean side tracks and such conveniences as are necessary to have in order to operate it as a railroad.

The master overrules the objection, stating that counsel can limit the matter in cross-examination, if they desire.

A. I consider that property worth at least a million and a half.

221 By Mr. BLODGETT:

Q. Will you state to the court whether you have or have not refused to do business with the company, this petitioner?

A. We have not refused to do business with them, but we have received and forwarded all the freight that they have offered to us, and we are carrying passengers daily for their line, and in fact, at the request of their representative, Col. Emerson—I think it was Emerson—I agreed to put on an additional train between Forsyth junction and St. Louis in order to accommodate people coming in from the lake in the evening. They claimed that the other trains we were running arrived at the depot a little too early, but the balance of their business can be accommodated by the trains that we run between here and Ferguson, and the passenger business is being done on those trains now.

Q. In fixing on the terms on which you would do business with this connecting line have you discriminated against it in any way?

A. I have not discriminated against them in any way. The patrons of their line have the same rates that any other persons do that travel between here and Forsyth junction or a similar distance, and the rate of freights charged on the materials or supplies or freight that they deliver is the schedule rate for such freight. I objected to their running an engine or cars over our track, stating that I had no authority to bring the trains of any foreign road into the Union depot, and that they must negotiate with the governing board at the Union depot first, and after they did that, if they would come to me, then I would talk to them about running their

trains, but that that must be first arranged before I could arrange with them.

222 Q. It is true that you did refuse to permit them to run their own trains over the Wabash railway between Forsyth junction and the Union depot?

A. Yes, sir.

Cross-examination by Mr. ORRICK:

Q. Or through the park into the Union depot anywhere on that track?

A. I do not think the park was mentioned in the conversation between myself and the officers of that road. Our talk was entirely in regard to business to and from Forsyth junction.

Q. The idea was to make some amicable arrangement. Wasn't that the purpose of the interview?

A. The idea, as I understood it, was to get their trains over our track.

Q. Under some amicable arrangement?

A. Well, under any arrangement that they could get.

Q. They were seeking to make some arrangement with you?

A. They were only seeking to get there, as I understood it. It did not make much difference what for, but mainly to get there.

Q. You say you have proposed to accept their business and have been carrying freight for them—that is, on your own cars—between the Union depot and the junction, and you have charged the local rate for it, have you not?

A. Yes, sir.

Q. Do you remember how much you charged them for hauling a car-load of iron from the Union depot, say 30,000 pounds?

A. Four cents a hundred; ten tons, $8, and for fifteen it would be $12.

Q. Those cars ordinarily hauled fifteen tons?

A. They haul from ten to twenty tons.

Q. If it were a twenty-ton car it would be $16 a car?

A. It would be, of course, that much more.

223 Q. How far is it from Forsyth junction to the Union depot?

A. Four and three-quarter miles.

Q. Now, as to passengers that you have hauled, you simply mean to say, do you not, that you hauled them in your cars; that they got off of your cars at Forsyth junction and could take our cars on our track if they saw proper to do so?

A. Yes, sir.

Q. Are you familiar with the real-estate values between the north line of the park and Eighteenth street? Have you been in the real-estate business to any extent in this city?

A. I have not been in the real-estate business.

Q. You have valued this road between the north line of the park and Eighteenth street at from a million and a quarter to a million and a half dollars, I understand?

A. Yes, sir.

Q. What do you include in that valuation?

A. I include the track—the main track and the side tracks.

Q. Does that include all the property of the Wabash in the Union depot?

A. It includes the property between the west line of the park and the Union depot—that is, the real estate and tracks, the side tracks laid thereon, and other appurtenances necessary for doing business.

Q. How much real estate has the Wabash road outside of this 30 feet of right of way?

A. Not a great deal; some fractional pieces. It was necessary to acquire them in order to get the right of way that was acquired.

Q. Does this plat show them? You seem to have whole blocks here, nearly. Now, outside of this right of way, what is this real estate worth?

A. The bulk of them—I do not know whether that map is made up to the present time and shows the side tracks that are in there or not.

224 Q. Here is nearly a block of ground, I see.

A. Yes, sir; that is covered with tracks.

Q. Those are side tracks for storing your cars?

A. For switching and handling trains. You can't run trains unless you have got a place to pass trains and put them out of the way or a place to put trains when they arrive here, so that you can handle them and sort out the cars and get them out of the way of trains going out. All this ground, nearly, is covered with tracks.

Q. Your company does a large business?

A. We do some considerable business.

Q. In making this estimate of a million and a half of dollars what proportion of that amount do you estimate for the track and right of way from the north line of the park through the park and to the eastern end of the cut?

A. I did not make it separately. I couldn't give you that figure without going over my details again.

Q. About.

A. No, sir; I never make any guess-work at figures.

Q. Are your figures of a million and a half dollars made on actual sales of real estate adjoining this right of way?

A. They are based on the best information we could get from the best real-estate men in the city as to what the value of the property is and comparing what has been paid recently by other companies owning ground parallel with this.

Q. Is there any other road parallel with this through the park, along there?

A. Not through the park, but there is this side.

Q. Well, now, it is four miles from the north line of the park to the Union depot; $1,500,000 would be nearly $400,000 a mile, wouldn't it?

A. Pretty near.

225 Q. How much of this four miles does this track cover to the east end of the cut?

A. I do not remember the length.
Q. Will you look at that plat and inform the court?
A. I do not know whether this has the figures on it or not.
Q. Nearly a mile, isn't it?
A. They have not any figures on this map to show that distance.
Q. From your recollection would you say it is about a mile from the north line of the park to the east line of the cut?
A. I should think not so far as that—not very much over half a mile.
Q. And you can't give me any estimate on the value of that?
A. No, sir.

By the MASTER:

Q. Can you give me the value or the approximate value of the right of way and the main track from the north line of the park to Eighteenth street and the Union depot?
A. I thought I had covered that in my testimony.
Q. You included the sidings.
A. Oh, you mean the main track stricken out from the sidings?
Q. Yes.
A. I couldn't do that without going into a calculation. We could not operate without the sidings. We could not pass trains nor take care of trains after receiving them nor make them up to go out without the sidings.
Q. Would that be so with another road that would run over your track?
A. Yes, sir; we would have to have additional track room if there was another road. We have not enough now to warrant our bringing another railroad in and be able to handle the trains successfully outside of the loading and unloading of freight. I mean
226 simply to pass trains, putting additional trains on the track, taking care of them after they arrive here, making them up ready to go out, and the storing of cars. You can't do business without having some place to put your loads and some place to put your empties away—some place to hold them to unload when people are not ready to unload them—and the facilities are not sufficient here now to admit of our taking any more business without acquiring more property. That is why I say the whole property wants to be taken in the valuation.

By Mr. ORRICK:

Q. The Union Depot Company has side-track facilities, have they not?
A. Yes; they have for loading and unloading, but not for making up trains, excepting passenger trains.

By the MASTER:

Q. Would it be practicable for any other road subject to your rules and regulations to use the track from the north line of the park to the depot—I mean the main track?
A. It could be done under the rules and regulations of this com-

pany, but usually it is done by substituting the motive power and trainmen of our own road to handle the trains of foreign roads. That is the way we handle the Keokuk & Northwestern line.

Q. That is, you take charge of their trains?

A. We furnish them the motive power and the train crews. I offered at one time to make some such arrangement, if we could agree upon terms, with these people, but the whole negotiation must be subject to their first having obtained an arrangement to enter the Union depot from the governing board. That is the only thing that suspended the negotiations referred to by Mr. Orrick as having been undertaken with me to get an entrance in here. I stated to them, when they succeeded in arranging at the Union depot for the sale of their tickets and for the admission of their trains, then for them to come to me and I would talk with them further whether we would run them or not.

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Q. Does the Union Depot Company control the entrance of trains into the Union depot east of Eighteenth street?

A. The Union depot governing board controls the admission of railroads into that system on those grounds.

By Mr. BLODGETT:

Q. East of Eighteenth street?

A. Yes, sir.

By the MASTER:

Q. What are the usual arrangements where one road uses a portion of a track of another as to the basis of compensation?

A. It is generally based on a rental based on valuation of the property and for repairs of track and other necessary expenses connected with the operation; it is on the basis of wheelage, which represents the percentage that the tenant line bears to the other—represents the percentage that it bears to the total number of cars passed over the line.

Q. If the renting line passed one-tenth of the number of cars that the owning line passed over the track it would pay one-tenth of this?

A. It would generally pay one-tenth of the repairs, but the custom in regard to the fixed charges, as we term it, is one-half. Another road is allowed to use the track—a foreign road is allowed to use the track of the parent road by paying one-half of the value of the track, the rental, the interest on one-half of the value of the property.

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Q. Six per cent. interest. Is that the basis used usually?

A. That is a matter of agreement. There are places where eight per cent. is paid.

Q. Can you give any illustrations where that rule applies?

A. It applies between the C., B. & Q. and the Wabash road, between Camp Point and Quincy. The property was all valued and everything agreed upon—the price of everything—and the Wabash paid one-half of the interest on the valuation. That is at the rate of seven per cent. there. When we operated the T., P. & W. we had

a similar arrangement running into Burlington, and there we paid eight per cent. on one-half of the valuation of the trackage, and paid bridge tolls and other terminal expenses in addition.

Q. Is it generally understood among railroad men as a usual basis or is it subject to contract arrangements between the two lines?

A. It is generally a matter of contract and agreement between the two lines.

By Mr. ORRICK:

Q. This C., B. & Q. road is a large trunk line like the Wabash, is it not? It has a good many miles of track?

A. The C., B. & Q. have a good many miles of track.

Q. That is, the Wabash and C., B. & Q. are roads of about equal prominence as to business?

A. Yes, sir.

Q. If there is any difference probably the C., B. & Q. does the larger business, does it not?

A. They have more miles of road than the Wabash has now, and on that account do more business.

Q. I will suppose a case—not this case, if you please—I will suppose a case of the C., B. & Q., which has a large mileage and does a large business. Say they had made a contract with a small
229 road doing a small business, whereby they had agreed to let it use its right of way for a certain distance for a fair and equitable compensation. Now, would you say that it would be fair and equitable, under such circumstances, for the C., B. & Q. to charge this small road the interest on one-half of the value of the track used, or would it not be fair and equitable to charge according to the wheelage in that case?

A. I never have known one railroad company to allow another railroad company——

Q. I am speaking in this case of where there is a contract. I am not speaking of where parties stand at arm's length, but where there is a contract beforehand. They say, "We will let you use this on a fair and equitable compensation." I will ask you whether, in your opinion, it would be fair and equitable under that state of facts for the C., B. & Q. to charge one-half, or would it not be more fair and equitable to charge according to the wheelage?

A. I would consider it fair and equitable to charge one-half, and in all my experience I do not call to mind now a single instance where there has been any other arrangement made. There are a great many cases where one line uses the track of another that does not do near the business that the parent lines does or the line that owns the property, but the circumstances that govern in those cases are these: They have been where negotiations have been made; that if they did not use the line they would have to build their own line, and then they would have to pay all the interest; therefore it would be better, even if they had only a small amount of traffic, to pay half the interest or an interest on half the valuation than to build a line of their own and have to pay all of it.

230 Q. Do you mean to say that you know of any instance or can point out any instance in your own knowledge where there was a contract between one road and another whereby the one road agreed to permit the other road to use its right of way and tracks for a fair and equitable compensation; that in ascertaining that fair and equitable compensation one-half was charged? Do you know of a case of that kind?

A. I do not know of any contract in existence on any other basis than paying one-half.

Q. You know of no contracts for use by any road in this country where they divide according to the wheelage basis?

A. I do not.

Q. Do you know anything of the arrangement between the Texas Pacific and the Denver & Fort Worth roads, four miles north of Fort Worth?

A. I do not know anything about what arrangement they have now.

Q. Do you say that you never knew of such an arrangement?

A. No, sir; I never knew of such an arrangement to be fixed charges on a wheelage basis.

Q. What do you mean by fixed charges?

A. Rental on bonds—interest on the valuation of the property.

Q. Is the wheelage basis a thing that is strange to you?

A. Not for dividing the expenses of maintenance.

Q. You say you know of no arrangement whereby the use of the track has been ascertained—the value of the use of a common track has been adjusted on a wheelage basis?

A. I have answered that.

Q. I did not catch your answer.

A. I answered that I know of no arrangement where the rentals were paid on a wheelage basis.

231 Q. You are now the manager for the receivers?

A. I am.

By Mr. BLODGETT:

Q. These arrangements of which you have spoken, these cases in which one company desiring to use the tracks of another has agreed to pay one-half the interest on the valuation, and then pay the cost of maintenance according to the wheelage—those arrangements are considered fair and equitable, are they?

A. Yes, sir.

By Mr. ORRICK:

Q. In those cases the party who pays half does not own half of the road either?

A. No, sir.

Q. And has no control over it except subject to the orders of the controlling road?

A. That is all.

By Mr. PRIEST:

Q. As an illustration, we will say that the St. Louis and San Francisco Railway Company desire to obtain the use of that part of the line of the Missouri Pacific railway from Kirkwood into St. Louis to the Union depot. The ordinary and usual arrangement that would be made between the two companies would be first to agree on the value of the Missouri Pacific line from Kirkwood into the Union depot?

A. Yes, sir.

Q. Suppose that value was two million of dollars, you would count that as one factor of the fixed charges, would you not?

A. Yes, sir.

Q. What other factor would be added to that as a fixed charge?

A. The necessary terminals that must be used here in order to bring those trains in and prepare them to go out.

Q. Are taxes always considered in addition to the value of the road as fixed charges?

A. Yes, sir; certainly.

232 Q. Then you charge an agreed per cent. on the value of the road and always divide the other fixed charges, such as terminal facilities and the taxes, by two, and the San Francisco road would pay one-half of that?

A. Yes, sir; one-half of the whole.

Q. One-half of the total sum of fixed charges, the taxes, interest, and terminal facilities; now, then, the payment to be made by the San Francisco road for maintenance and operating expenses would be determined on a wheelage basis?

A. The percentage that their cars bore to the total number handled.

Q. That would apply exclusively to maintenance?

A. To maintenance and operating expenses.

Q. So that in determining these things you classify the payments in two classes—first, the fixed charges, and, second, the operating expenses or cost of maintenance?

A. Yes, sir.

By Mr. ORRICK:

Q. What do you include in maintenance and fixed charges—are taxes included under the head of maintenance, or under what head?

A. No, sir; taxes are always separated from maintenance. They are fixed charges. I think they are about as much fixed as anything you can fix. I do not see how you can get rid of them.

Q. They vary from year to year?

A. Yes, sir.

Q. But some roads include taxes under the head of maintenance, do they not?

A. I do not know of anybody that does.

Q. It being a charge that is more or less varied each year?

A. It varies very little; it is liable to be more, but never less.

Q. Do you know what the taxes of the Wabash rail-
233 road are?

A. I do not remember. They are a good deal too much, I know.

Q. About how many thousand dollars?

A. Somewhere between twelve and twenty.

Q. What is the rate of taxation, do you know?

A. I do not remember just exactly. It is between two and one-half and four per cent., I believe. I do not remember. I have not gone into details on tax matters very closely.

Q. The city of St. Louis tax is about $2.60?

A. I think that is about what my tax returns are.

JAMES F. HOW, sworn on the part of the receivers, testifies as follows:

Direct examination by Mr. BLODGETT:

Q. What is your occupation?

A. I am general agent for the receivers of the Wabash, St. Louis & Pacific Railway Company.

Q. How long have you held that position?

A. Since the appointment of the receivers.

Q. When was that?

A. May 28th, 1884.

Q. What was your business prior to that time?

A. I was secretary of the Wabash, St. Louis & Pacific Railway Company immediately prior to that time.

Q. Prior to that what was your occupation?

A. Secretary and vice-president of the St. Louis, Kansas City & Northern railway.

Q. As secretary and vice-president had you occasion to approve vouchers and keep yourself posted with respect to the cost of the railway and the appurtenances of the St. Louis, Kansas City & Northern Railway Company between the Union depot and the north line of the park in the city of St. Louis?

A. Yes, sir.

234 Q. State now to the court what, to the best of your recollection, was the actual cost to the St. Louis, Kansas City & Northern Railway Company of that property.

Mr. Orrick, of counsel for the intervenors, objects to the question for the reason that the vouchers are the best evidence as to the cost.

Objection overruled, the master stating that the witness is not to state the contents of the vouchers, but his remembrance in the matter.

A. My remembrance is that it cost between $1,000,000 and $1,100,000. I would say, in connection with this, my remembrance of the cost of the whole road is that it was one million and a quarter dollars ($1,250,000). I don't think any figures were made to show

what it cost from the north line of the park, but the expenses there at a liberal estimate would not exceed over $250,000.

Q. From there to Ferguson?

A. From there to Ferguson.

Q. State to the court what you would consider a present fair and equitable valuation of the right of way and superstructure and its necessary appurtenances from the north line of the park to the Union depot.

A. I think as the road stands to-day it could not be built for less than $1,800,000. If a new line had to be built in the city—a similar line—it would cost fully two million five hundred thousand dollars ($2,500,000). I mean by that that if a new line was built there would be buildings on a great deal of the property which would have to be paid for, and although they would be worthless they would increase the cost and do not come in the calculation as the road stands to-day.

Q. Much of the way solid blocks of buildings would have to be removed?

A. Yes, sir.

235 Q. And that would increase the cost?

A. Yes, sir; it would increase it very materially.

Q. What do you know about the connection of the St. Louis, Kansas City & Colorado railway with the Wabash, how it is connected, and where and on whose ground?

A. Up to a few months ago they had no connection. At their request we made a connection at Forsyth junction over own ground. My remembrance is they furnished material, at least a part of it, for a distance of several hundred feet; probably three hundred feet.

Q. Then that connection was made, you say, with the consent and approval of the receivers and over the right of way of the Wabash, St. Louis & Pacific Railway Company?

A. Yes, sir.

Q. Have you known any disposition on the part of the receivers to refuse to do business with that road or to accommodate them?

A. No, sir.

Q. As a connecting line?

A. No, sir. We would be very glad to do business for them.

Q. That connection was made and the track of the St. Louis, Kansas City & Colorado railroad was connected with that of the Wabash as a mere temporary arrangement and for their accommodation, was it not?

A. Yes, sir; for their accommodation. It is our track, and we can take it up any time we want to. Of course, we would have to surrender to them the material they put in if we took it up.

Q. It was made with that understanding?

A. I don't know whether anything was said at the time, but that was the understanding.

236 Q. Now, as an officer of the Wabash, St. Louis & Pacific Railway Company, have you had occasion to know the terms that are usually or if you have become informed of the terms that

are usually made between railway companies for the joint use of tracks and railway property?

A. Yes, sir.

Q. The Wabash railway has, in operating its lines, made many such contracts for the use of other lines, and have they not in certain instances admitted other railroads to the use of their tracks?

A. They have done both in a number of cases.

Q. Well, now, where did they make one?

A. They have an arrangement by which at present they are running from Camp Point to Quincy over the track of the C., B. and Q. We formerly had an arrangement by which we ran into Burlington——

Q. Hold on. On what terms? What were the terms of that arrangement with the C., B. and Q. from Camp Point to Quincy?

A. The valuation of the property was arrived at, and we paid the interest on one-half of that valuation at the rate of eight per cent. per annum, and we still pay it, and we pay for the maintenance of the track on a wheelage basis.

Q. Now, you speak of an arrangement by which the Wabash ran into Burlington. What were the terms of that arrangement and with whom was it made?

A. That was made with the C., B. & Q. on the same basis.

Q. State the terms.

A. That is, we arrived at a valuation of the track, and I think we paid interest in that case at seven per cent., and one-half of the valuation and the expenses were divided on a wheelage basis.

Q. Is there any other arrangement?

A. Yes, sir. We have an arrangement by which we run
237 over the Peoria and Pekin Union railway from Hollis into Peoria. In that case we arrived at the valuation for the road, and we paid interest on the whole of it. The Peoria and Pekin Union were not using it at all, and of course we paid all the maintenance.

Q. When it was used by us solely we paid interest on the valuation and all the cost of maintenance?

A. Yes, sir.

Q. Are there any other arrangements?

A. At Detroit we run three and a half miles into the Detroit Union depot, and we pay there seven per cent. on the valuation with the understanding—that is my remembrance only; I have not refreshed myself on that for some time, and if any other line comes in to use that property—we are using it solely now—that the interest shall be divided.

Q. We are now the sole tenants?

A. Yes, sir.

Q. And we pay the interest on the valuation?

A. Yes, sir.

Q. With the understanding that if another company comes in they will pay one-half—is that it?

A. That is my remembrance of it; yes, sir. In Chicago we run over the Western Indiana road over five miles making our entrance

into that city. We pay there a fixed rental each month, based, however, on the valuation of the property we use.

Q. At an agreed percentage?

A. At an agreed percentage; yes, sir.

Q. It is six per cent., is it not?

A. I think it is six per cent. We also pay there for the maintenance according to the wheelage.

Q. Where you have the exclusive use of any property, who pays the rental on that?

A. We pay the entire rental on that on a valuation basis.

238 Q. Have you got any arrangements with the Pittsburg or Pennsylvania Company?

A. We have an arrangement with the Pennsylvania Company by which they run over our track for fifty-five miles from Kokomo junction to Indianapolis. They pay six per cent. on one-half of the valuation and they pay the maintenance in accordance with the wheelage.

Q. They pay six per cent. and one-half the taxes, do they not?

A. Yes, sir.

Q. What is the arrangement by which the Wabash uses the line from the State line of Illinois to Logansport, Ind.?

A. It was exactly a similar arrangement. We pay the interest on one-half of the valuation of their track, and we pay one-half of the taxes and the maintenance on the basis of wheelage. We have one or two others. We have an arrangement with the Louisville, New Albany and Chicago road to use five and a half miles of our track from Hollis into Indianapolis, paying six per cent. on one-half of the valuation and paying one-half of the taxes, and for a long time they paid a portion of the maintenance on the wheelage basis, but now they pay a fixed sum per month for maintenance and their proportion of the expenses.

By the MASTER:

Q. Is that fixed sum arrived at on the basis of what they had been paying before?

A. Yes, sir.

By Col. BLODGETT:

Q. That is on a percentage?

A. Yes, sir; and also on the basis of what their expenses were before.

By the MASTER:

Q. An average wheelage?

A. Yes, sir.

By Col. BLODGETT:

239 Q. All arrangements such as you have mentioned as having been made and having existed between the Wabash and its connecting lines, are they about such as are generally made be-

tween railroad companies under such circumstances, and are they such as are considered fair and equitable?

A. Yes, sir. I think those arrangements are so common that it is almost a rule to adopt that as a standard.

Cross-examination by Mr. ORRICK:

Q. What did I understand you to say you valued this property at between the north line of the park and Eighteenth street?

A. I said that I valued it as it stood at about one million eight hundred thousand dollars ($1,800,000).

Q. What did you value the whole line at from Ferguson in?

A. I said it cost, in my remembrance, about a million and a quarter of dollars.

Q. What do you value it at?

A. I think that was ten years ago, and I think the property could not be purchased at anything now like the price it cost then.

Q. What do you value it at now?

A. I think it would be worth over two million dollars.

Q. As a railroad?

A. As a railroad—that is, I think — would cost that much to replace it.

Q. The Wabash in operating its railroad, of which this is a part, failed and went into the hands of a receiver since this road has been built, did it not?

A. Yes, sir.

Q. What do you say this road between the north line of the park and Eighteenth street cost?

A. I said the figures were not separated—the cost of the line from Ferguson to St. Louis—but estimating——

240 Q. What did it cost from Ferguson to St. Louis?

A. My remembrance is it cost about a million and a quarter dollars.

Q. Did you get that information from an examination of the vouchers of the amount paid out for that road?

A. No, sir; not recently; that is my remembrance of information I got. I was fully conversant with the property at that time.

Q. Did you ever make an examination of the vouchers with a view of ascertaining what the road between Eighteenth street and Ferguson cost?

A. We kept an account, Mr. Lewis and myself, at the time of building of what the road was costing us, and my remembrance is based on those figures made at that time.

Q. And you say that it was about a million and a quarter of dollars?

A. About a million and a quarter; yes, sir.

Q. There was some quite heavy work west of the park where you crossed the road leading to Ferguson, some very heavy and expensive bridging over cuts between the park and Ferguson?

A. Some pretty heavy work after you get out to Normandy.

Q. There were some very heavy expenses incident to bridges across the pike road, were there not?

A. The bridges were not so expensive as the cuts and fills.

Q. There is a large arched bridge across the county road this side of Ferguson, is there not?

A. I think there is an arch there.

Q. And there are heavy cuts and fills all through there?

A. Yes, sir.

Q. You have never made any estimate as to the cost of the particular parts of this road?

A. You mean the cost at that time; no, sir.

241 Q. And you have gone over no vouchers since then for the purpose of ascertaining what the portion of the road between the north line of the park and Eighteenth street cost?

A. No, sir; except this: The vouchers were made up—at least the estimates were made up—which Col. Talmage referred to in his testimony as to the valuation of the road to-day.

Q. I understand. I speak of the cost. Can you tell me about what proportion of this valuation of $1,250,000 the road between the north line of the park and Eighteenth street—the road through the park to the east end of the cut east of the park—cost? For instance, you have given an estimate of $1,250,000 for the road between the north line of the park and Eighteenth street. I understand you to say that is a mere estimate. Now, on the same basis, what would you estimate that portion to cost from the north line of the park to the east end of the cut—that is, through the park to the east end of the cut? What proportion of that cost would that be?

A. I couldn't tell you.

Q. Well, about?

A. I think we paid this $1,250,000 principally to get into the park. That was the way we looked at it at that time. I would calculate that the passage through the park would cost us that much, and the additional work, at a rough estimate—a very rough estimate—I should think it would cost over $200,000, or maybe $220,000, through the park and cut.

Q. What would be the present proportionate value for that portion of the line of the $1,250,000?

A. I put my present valuation at $1,800,000. I said I did not think the line could be put there to-day for $1,800,000.

Q. Of course it could not be put there at all.

242 A. I mean if that property was all clear of houses I don't think you could buy it for that.

Q. You say the present value of the whole is $1,800,000. What proportion of that is made up of the property between the north line of the park and the east end of the cut?

A. Fully one-fifth of it.

Q. Have you made any critical examination of the different pieces of property through which this line passes east of the park with the view of determining the present valuations?

A. No more than this, Mr. Orrick: We have bought some property adjacent to the line of our road and I have been pretty fully conversant with the property sold and bought by others, and comparing the prices that that property has brought recently—within

the last two or three years—with the prices that we paid when we built that line I arrived at the idea I give.

Q. Have you bought another right of way 30 feet wide adjoining this right of way recently, or since you bought that?

A. No, sir; but we have bought isolated lots here and there and the San Francisco road has bought a right of way adjoining us for quite a lengthy distance, and I know what figures they paid.

Q. Did you ever estimate what $1,800,000 would be per acre for a right of way 30 feet wide between the north line of the park and Eighteenth street?

A. I never have estimated that, but I have found when buying property for railroad purposes that estimates in use on other occasions will not apply.

Q. I mean per acre or per foot. How much would it be?

A. No, sir; I have never figured it out. I know what the 'Frisco road paid and I know that our calculations on which we give these figures are based a good deal on that and experience of our own.

243 Q. Did you find the cost of a lot in one particular locality and put that on the whole line of your road?

A. Yes, sir.

Q. You did not take up lot by lot in a particular location and go right along and ascertain the value?

A. We tried to take lot by lot in blocks. If we knew of a lot being sold in a certain block, or of two or three lots, we adopted that as the basis of that block.

Q. In speaking of that valuation, did you value a strip of land 30 feet in width? Did you put the value of a whole lot upon that?

A. Yes, sir; we generally found it necessary for us to buy a whole lot when we wanted to buy 30 feet only. A road cannot get along with 30 feet running into the city of St. Louis, as it has to have side tracks, as Col. Talmage explained in his testimony.

Q. You can put a side track on 30 feet; and you have done that in regard to the Wabash railway?

A. Yes, sir; but you have to have several side tracks running into town.

Q. You are using this now to Grand avenue, are you not?

A. I don't think to Grand avenue. We have more than 30 feet beyond Grand avenue. After you get towards Rock Springs then we have been using that.

Q. Then, I understand you, in estimating values, where you found a lot with the ordinary depth that cost so much per foot you would put that cost on a depth of 30 feet?

A. We have done this where we had a certain piece of property that cost us $25 a foot when we bought it, and when the property adjoining it at that time could be bought for $25 a foot, and it now costs $100 a foot, we calculate that our $25 property is worth $100.

244 Q. What is the depth of those lots?

A. They vary.

Q. When you take 30 feet off of the depth you charge that 30 feet with the cost of the whole lot?

A. Yes, sir.

Q. Coming to the matter of the use of tracks by other roads, in any cases to which you have referred where the Wabash is either using the track of other roads or other roads are using its tracks at any place, was there a contract in existence before any of those roads were constructed which required them to permit these other companies proposing to use their right of way—to use the right of way for a fair and equitable compensation?

A. Well, in the two cases I think of now the roads were not built until after we had made a contract with them for the use of them at certain sums which we thought were fair and equitable. They were the best terms we could make, anyhow.

Q. I understand; but that is not my question.

A. That is the only case.

Q. There is no such case that you now remember?

A. No, sir; not unless you call those cases such.

Q. In other words, where these contracts were made the parties were dealing with each other at arm's length, each one owning their track disencumbered of any prior obligation which compelled it to permit another road to use their track?

A. Well, as I say in the cases of this entrance into Detroit and the entrance into Chicago, the tracks were not built, and nothing would have been done if they had not been able to make this arrangement with us.

Q. There you owned the right of way into Detroit?

A. No, sir; we did not. The other parties acquired it after we had made this contract with them.

245 Q. You had no contract with the Detroit railway prior to that time?

A. There was no Detroit railroad and there was no Western Indiana road into Chicago until they had made contracts with us agreeing to give us the use of their road after they had acquired it.

Q. That was down in the heart of the city of Chicago, was it not?

A. Our entrance commences about five miles out from Chicago. It is no more in the heart of the city than our entrance is in the city of St. Louis.

Q. Don't you know of any arrangements where a use is had on a wheelage basis?

A. No, sir.

Q. Have you never had occasion to inquire into the terms of the use of the road between Fort Worth and another place in Texas—I think it is the Texas & Pacific road—and the road running north to Wichita Falls—I think it is the Denver & Fort Worth road?

A. No, sir; I never had occasion to inquire.

Q. You don't know that is on a wheelage basis?

A. No, sir; and I would not accept that as an agreement because it is a very close relation of the Missouri Pacific, who were operating the Texas & Pacific when they made that agreement with the Fort Worth & Denver road.

Q. But it was equitable, was it not?

A. I suppose it was, but it was like taking it from one pocket and putting it into the other.

Q. They pay according to the wheels that run over it, according to each one that runs over it. That is equitable, isn't it?

A. I should have to say if it was considered so railroads would more generally adopt it.

Q. You do not say there is no such an arrangement, but that you simply do not know of such?

A. I say in my experience as a railroad man I never heard of it.

246 Q. You mean to say that it is equitable for the railroad owning the road to continue to own the road after the contract for use is made and have the other party using it in conjunction with it to pay one-half practically on the cost of the road?

A. I think it is.

Q. If they pay one-half why don't they practically own one-half?

A. They only pay the interest on one-half.

Q. If they have to pay the interest on one-half wouldn't that entitle them to equal control?

A. I won't go that far. I will say it is equitable so long as the road that built the line is willing to have them there as partners. I should say in all these arrangements I spoke of they are terminable, I think, on a year's notice.

Q. In other words, they are arrangements made where parties are dealing with each other at arm's length, and the owning road is in a position to say, "You must get off of here whenever I want you to."

A. Hardly that; but they may want your road this year and next year they may not want it.

Q. And the arrangements are such that you can terminate them in that way?

A. Yes, sir. I think a party who has had the foresight to acquire the property is entitled to a consideration which no one can pay him for.

Q. Where the circumstances are that they got the property by making an agreement it is not a question of oversight, but a question of coincident fact, is it not?

A. I never had any connection with anything of that kind.

Q. So that you are not speaking of a case of that kind.

A. No, sir; I don't know of a case of that kind.

By Mr. HOUGH:

247 Q. You think that if two parties occupy a house which is owned by one of them on an agreement that they pay interest on the cost of the house it is not fair that the party who has no interest in the ownership of the house should be given half of the property?

A. No, sir.

Q. He pays his rent and gets the use of it for that?

A. Yes, sir.

By Mr. ORRICK:

Q. If a party own a house with six rooms in it and another party uses one room only, is it proper that he should pay half of the rental of the whole house?

A. That depends altogether on how badly he wants to be there.

Q. Suppose the party that owned that house is under obligation or contract to permit him to occupy that portion of the house on fair and reasonable terms, would it be fair and equitable to charge him one-half of the rental of the whole house for occupying only one room?

A. He might be such an objectionable tenant as to make you charge him more than that.

Q. Suppose we had agreed beforehand he was not an objectionable tenant and he agreed.

A. It takes two parties to make an agreement.

The MASTER: Those illustrations would come more properly in the arguments than in the testimony.

Mr. ORRICK: Very well. I don't care to ask Mr. How anything further in that respect.

By the MASTER:

Q. I would like to ask you in regard to arrangements made for the joint use of tracks. Were they cases in which the interests of the roads were antagonistic or friendly?

A. They were cases where the roads were competitors. In
248 the case of the C., B. & Q. and those into Burlington and Quincy both their roads and ours were competing for business there. We have already got notice from the C., B. & Q. that we have got to give up our line into Quincy the first of next May. Whether they want to ask us more rent or what it means I do not know. If they were anxious to have us there on these terms they probably would not give the notice.

Q. Is that so in all the other instances?

A. Well, in the case of the entrance into Chicago and the entrance into Detroit those roads were only formed to furnish means of entrance for the various roads into those cities. The Pennsylvania Company and the New Albany and Chicago road were competitors of ours into Indianapolis.

Q. Do you remember that the San Francisco ran over the Pacific road here for some time, coming into the city?

A. Yes, sir.

Q. Do you remember what the arrangement between those two roads was, or do you know?

A. No; I know they paid a very heavy rental, but whether it was based on valuation or what I don't know. I understand the arrangement on which they are now running over the Pacific road is on a basis of valuation, they paying half the interest, but what the valuation is I do not remember.

Q. Do you know of any instance where one road has condemned the right to run over another road?

A. No, sir; I don't know of any instance of that kind.

By Mr. ORRICK:

Q. In this matter of the C., B. & Q. and your relations with it as to the entrance into Quincy, have you not complained of the onerous terms which they imposed upon your road in the use of the right of way, and has it not been the subject of acrimonious
249 correspondence between your company and Mr. Perkins?

A. I don't remember any such correspondence. I think there was some complaint about the charges in Quincy and the charges made over the Quincy bridge, but I don't remember any complaint was ever made about the charges from Camp Point into Quincy.

Q. Well, into Burlington. Did you not have trouble about the charges there?

A. They raised the price on us in Burlington above the figures I had given here, and we complained about that.

Q. Are you running into Burlington now?

A. No, sir; we have no road into Burlington now.

Q. There was no contract between you and the Burlington road whereby you were entitled to go over their right of way prior to the time you got possession?

A. No, sir.

WELLS H. BLODGETT, sworn for the receivers, testifies as follows:

Direct examination by Mr. HOUGH:

Q. State to the master what you know about the arrangement between the San Francisco road and the Missouri Pacific, about which the master questioned Mr. How.

A. I think it was about two years ago last winter that I was called upon by Captain Hayes, then first vice-president and general manager of the Missouri Pacific railroad and its leased lines, to prepare a contract between that company and the St. Louis and San Francisco Railway Company for the use of the tracks and terminals between Grand avenue and the Union depot. I prepared a contract, patterning it after that existing between the Wabash and the Louis-
250 ville, New Albany and Chicago road for the joint use of the terminal facilities of the Wabash in Indianapolis. The contract was prepared with a great deal of care, and the basis of the agreement was that the property should be valued by disinterested parties, two of whom were named. One was Mr. McCullough, of the Pennsylvania Railroad Company, and the other one I do not recollect, but they were to select a third party, and were to fix the value on the property. Then the 'Frisco was to pay six per cent. on the valuation and pay maintenance according to the wheelage between the two. I prepared a contract and saw Mr. O'Day afterwards, and he told me it was satisfactory, and I have understood the contract was signed, although I have never seen it since it was signed. The arrangement, however, was, I think, consummated between them. It is my understanding that it was, although I have never seen the

contract since it was under the seal of the two companies; but, as I said, Mr. O'Day told me it was satisfactory to them, and Captain Hayes said it was satisfactory to him.

Cross-examination by Mr. ORRICK:

Q. Those two roads were large trunk roads coming here into St. Louis. At that time the 'Frisco road had no right under a contract to use that right of way of the Pacific road from Grand avenue in on any terms, had it?

A. Not that I ever heard of; they made no claim of that sort.

Q. And they are roads of about equal prominence coming into the city of St. Louis?

A. They are two leading roads coming into the city.

251 *Rebuttal.*

JULIUS PITZMAN, sworn for the intervenor, testifies as follows:

Direct examination by Mr. ORRICK:

Q. How long have you resided in St. Louis?

A. Since 1854.

Q. What has been your business for many years past?

A. I was deputy county surveyor up to the time of the war; then I joined the army. In 1863 I returned to St. Louis and was elected county surveyor, and held that office as long as the county existed, and since the separation of the city from the county I have been city surveyor and practice as civil engineer.

Q. Please state whether for years past you have been what might be considered a standing commissioner, appointed by the courts here with other commissioners in partitioning real estate and appraising real estate in the city.

A. Yes, sir; since 1863 I have partitioned real estates valued from twenty millions to thirty millions of dollars.

Q. Are you familiar with the value of real estate in the city of St. Louis?

A. Yes, sir.

Q. Have you made it a study for years past?

A. Yes, sir.

Q. Will you please look at this plat, being chart A? I call your attention to a dotted line which represents the right of way east of Forest park, thirty feet wide, extending to Tayon avenue or Eighteenth street.

A. Is that the center line?

252 Q. Yes; I will ask you whether you made any examination with a view of determining what the present value of that strip of thirty feet wide, the center of which is indicated by that dotted line, is?

A. Yes, sir.

Q. Will you please state what its present value is?

A. My estimate of the value of that piece of property is $265,141.

Q. That is its present market value?

A. That is what I consider its present market value and the full market value.

Q. Please state to the master what familiarity you have with property in the locality covered by that right of way.

A. I have served frequently as commissioner in condemnation proceedings for railroads for the Union Depot Company, the Missouri Pacific, and for the Wabash railroad, in condemning this very same right of way; besides that, I acted before the Wabash Railway Company proceeded to condemn the property. They had a great many cases where property was owned by Germans along the line of the road, and they could not come to terms with them, and they asked me to go and compromise with them, and I bought the property at what I considered was the fair value.

Cross-examination by Mr. BLODGETT:

Q. That valuation that you put here of $265,141 is on that strip thirty feet wide?

A. Yes, sir.

Q. And nothing else?

A. Irrespective of the improvements, rails, ties, etc., whatever may be on the right of way, simply considered as vacant land, level, with the streets thirty feet wide.

Q. In that kind of a strip?

A. Yes, sir.

253 Q. That is all?

A. No. I will say that I made the valuation of a full-sized lot from street to street—I valued it at 120 feet—fronting on a 60-foot street and running back to a line, and my total valuation of the property was $1,060,565, and then, in making the valuation of the property, we always consider the front worth twice as much as the rear of the lot. We took the area of the lot to the center of the street, and valued this land, 120 feet deep, to a 60-foot street, and in order to value its contents by the square foot we take it through the center of the street and take in thirty feet, which will make 150 feet, and then the thirty-foot strip would be one-fifth of the total value. This road does not run regularly through the lots, and cuts some of them to a disadvantage, and so, in place of taking a one-fifth valuation, I have taken one-fourth, which would be a fair estimate, in my opinion, in the way some of the lots are cut in, taking of the thirty feet.

By Mr. ORRICK:

Q. Through the territory through which the right of way goes from Eighteenth street to beyond Grand avenue, what effect, if any, would the taking of thirty-foot strip have on the remaining lots that were left; in what respect would it leave it?

A. The remaining property owned by the Wabash.

Q. What damage would it be to the adjoining property?

A. I think it would depreciate in the same ratio that you increase the travel on the road.

Q. It would depreciate the value of the lot left?

A. Yes, sir. The more lines of road you run over the same track.
Q. What is the character of the property from Eighteenth street to west of Grand avenue?
254 A. The highest value it has it has for railroad or manufacturing property.
Q. What makes it valuable for manufacturing property?
A. The railroad facilities.

By Mr. HOUGH:

Q. How much damage to the adjacent property was occasioned by taking the thirty feet?
A. Do you mean when it was condemned?
Q. No, now. How much would it damage the adjacent property to cut the thirty feet out?
A. I can hardly answer that question directly. It depends on the breadth of it. If large enough to use for manufacturing purposes it is appreciated. If there was a strip of land to run an additional switch onto the Wabash it would not depreciate it, but if there was not enough it would.
Q. Do you know of any case where the property-owners did not claim damages to the property by taking thirty feet out?
A. No, sir.
Q. Did any of them get it?
A. Yes, sir; I think the commissioner did allow in many instances damages to the adjoining property.

Counsel for the intervenor objected to this examination. Objection overruled.

Q. What did they get?
A. In most instances where the property was bought at private sale by the Wabash road.
Q. I am talking of condemnation proceedings now. Where they contracted for it that covered everything?
A. It depended entirely upon each individual lot what damages were allowed. Sometimes the property was left in bad condition, and where perhaps a great portion of the value of the lot was given in place of the thirty-foot strip, and in other cases where sufficient depth was left to use it for a warehouse, hardly any damage was paid.
255 Q. Do you know the amount of damage they paid over the whole strip?
A. I do not recollect the amount, it is so long since.

L. B. JONES, sworn for the intervenor, testifies as follows:

Direct examination by Mr. ORRICK:

Q. You reside here in the city?
A. Yes, sir.
Q. How long have you resided here?
A. About twelve years.
Q. What is your business?

A. Real estate.

Q. What experience, if any, have you with the general character and value of this property leading out from the Union depot, say west of Eighteenth street to Forest park?

A. I have made it a special business to sell property along the tracks for manufacturing purposes and have purchased for the railroads at different times.

Q. This has been your special business?

A. Yes, sir.

Q. How long have you been in business in that particular locality?

A. Ten to twelve years.

Q. You are familiar with the line of the Wabash road, as indicated by the dotted line referred to by Mr. Pitzman?

A. Yes, sir.

Q. Please state to the master whether you have recently made an estimate in conjunction with Mr. Pitzman or any other of the value of that right of way of the Wabash road between Eighteenth street and the east line of Forest park, as indicated by chart A.

A. Yes, sir; we made the same estimate and came to the
256 same conclusion as to prices, making five or six divisions of the property from Eighteenth street to Forest park.

Q. The amount you make is $265,141?

A. Yes, sir; the same figures for the total.

Q. That is the present value of this property?

A. Yes, sir; I consider that the present value of this property.

Q. Now, in arriving at this estimate you say you made certain divisions?

A. Yes, sir.

Q. How did you make the divisions?

A. Between Eighteenth street and Twenty-first, twelve hundred feet, at $175 a foot.

Q. How does that compare with the market price?

A. That I should consider about the highest value.

Q. Go on, now.

A. It is sold for two hundred dollars and I am negotiating a sale for $150. I put it between the two—between Mercer street, Twenty-first street, and Jefferson avenue, 183 feet, at $150 a foot.

Q. State on what you base that valuation.

A. On what parties would be willing to pay and have offered if they could get certain property in there.

Q. Next?

A. Between Jefferson avenue and Compton, 2,497 feet, at $100.

Q. What do you base that estimate on?

A. I base that on what a piece of property had been leased for on the south side, which I consider worth less than on the north side.

Q. Go to the next.

A. From Compton avenue to Grand avenue, 2,900 feet, at $80. I sold a piece of property on the south side at $80 a foot within the last four months, adjacent to the tracks.

257 Q. Do you consider that a fair price for it?

A. Yes, sir; between Grand avenue and Cabanne, 930 feet, at $60 a foot.

Q. That is on low ground?

A. Yes, sir; I was on the stand as an expert witness for Mr. Obear, for the railroad. I was called on by Mr. Obear to confirm the commissioner's report. They did not give enough. They put it at forty dollars, and ground was estimated at seventy dollars a foot at Grand avenue, and so we put it at sixty dollars all through.

Q. From Cabanne west?

A. From Cabanne to the Manchester road, 1,360 feet, at $40 a foot, and from the Manchester road to Forest park, 5,670 feet, at $20 a foot. The total is $1,060,565 by Mr. Pitzman's figures.

Q. That is based on lots of what depth?

A. A depth of 120 feet.

Q. And the thirty feet you have estimated at what?

A. One-fourth. It would make one-fifth, but counting the damage to some lots it would not be quite that much, and it would bring it to one-fourth instead of one-fifth.

Cross-examination by Mr. HOUGH:

Q. This is an estimate for lots all the way through?

A. 120-foot lots.

Q. How much in the aggregate?

A. $1,060,565.

Q. Now, the estimate you have got there is based on pieces or lots?

A. Averaging 120 feet deep.

Q. Do you know what that strip cost the railroad company?

A. I do not.

Q. Do you know what damages were paid to the adjacent proprietors for getting it?

A. I do not. I put this as vacant ground.

258 Q. Do you know how many houses were torn down for which they had to pay?

A. No; I do not. I took it as vacant ground.

By Mr. ORRICK:

Q. What is the general character of this ground from Eighteenth street, say, to a point two or three blocks west of Grand avenue—what is it especially available for?

A. Nothing but manufactories.

Q. What effect does the presence of the railroad on a part of a lot have on the balance of the lot?

A. It would make it more valuable. It is worth double what it would be worth if it was off from it.

By Mr. HOUGH:

Q. This estimate does not include any improvements on the ground, the tracks, etc.?

A. No; only the naked ground.

JOHN GRETHER, sworn for the intervenor, testifies as follows:

Direct examination by Mr. ORRICK:

Q. What is your business?
A. Real-estate agent.
Q. Where?
A. 207 North Eighth street, in this city.
Q. What is your firm?
A. Grether & Boeck.
Q. How long have you been in the real-estate business in this city?
A. Twenty-one years on the first of May last.
Q. Are you familiar with the value of property, say, from Eighteenth street or the Union depot grounds west toward Forest park?
A. Generally; yes, sir.
Q. Have you considered recently with Mr. Pitzman or others the value of a certain strip of ground, as indicated here by the
259 plat here, from Tayon avenue on the east, thirty feet wide, running west, as indicated by the dotted lines, to the east end of Forest park?
A. Yes, sir—that is, we did not go over the ground, but I have been over the ground—most of it.
Q. You were familiar with it, having sold and bought property there at different times?
A. Yes, sir; at different points on the line.
Q. Please state to the master what, in your opinion, is the present value of that strip of ground as indicated upon chart A by the dotted line, thirty feet wide, extending from Eighteenth street to the east line of Forest park?
A. The estimate that we put upon it—Mr. Jones, Mr. Pitzman, and I—was about $265,000.
Q. Is that the present value?
A. That is the present value; yes, sir.

Cross-examination by Mr. HOUGH:

Q. How long were you and Mr. Pitzman and Mr. Jones in making the estimate?
A. Probably about an hour.
Q. Since the adjournment of court?
A. We went at it this morning. We were spoken to about it yesterday afternoon.
Q. About an hour?
A. An hour or an hour and a half.
Q. Do you know what it cost the railroad company to get that?
A. No, sir.
Q. Do you know what damages they paid to the adjacent property-owners?
A. I do not.
Q. Was that estimate of $265,000 based on the price of lots, and of what size?

A. We based our estimate upon these facts: We assume a lot of the depth of 125 to 150 feet, unimproved, without any im-
260 provements whatever, to be worth so much per front foot and take about one-fourth of the property to make the difference in the price; the corners are occasionally higher, and then damages to the lot by reason of making it shallower than usual.

Q. What is the estimate of the value of the lots clear all the way through, $1,065,000?

A. That is the footing that Mr. Pitzman made. I have mine here. It is not quite that, but it is very near it, though.

Q. You do not know about the improvements on the property, when taken?

A. No, sir.

Q. This estimate of yours is apart from what is on it now, the side tracks and railroads, just the naked lots?

A. Yes, sir; just as though the ground were all vacant.

Q. If that ground were all vacant all through there now and no railroad there, is it your opinion that the Wabash Company or any other railroad company could get a strip through there for $265,000?

A. That I could not tell; I think that would be about what it would be worth.

Q. That is what the land would be worth?

A. Yes, sir.

Q. Estimating it in lots in the way you stated?

A. Yes, sir.

Q. Don't you think that if the railroad company had to buy it through there they would have to pay more than $265,000 for that strip?

A. The probability is they could not buy it. They would have to buy the whole lot in nearly every case.

Q. And if they had to condemn it they would have to pay damages on either side?

A. If any damage was done very likely they would.

261 Q. Do you know what the 'Frisco people have had to pay to get into the Union depot here recently?

Counsel for the intervenor objects to the question.

Q. Do you know the value of the lots where they come in?

A. They come in on the south side.

Q. It is somewhat the same character of ground; you are familiar with the ground?

A. Yes, sir.

Q. Do you know what they paid?

A. I do not know the total amount.

Q. Do you know what they paid in any instance a front foot?

A. I could not say. I gave an opinion before the commissioners as to the value of some of it. I could not tell what they allowed.

Counsel for the intervenor produces the agreement of the consolidation of the Wabash Railway Company with the St. Louis, Kansas City & Northern Railway Company under the name of the Wabash, St. Louis & Pacific Railway Company, filed with the secre-

tary of state on November 10, 1879, and the resolutions of the stockholders of the Wabash Railway Company and of the St. Louis, Kansas City & Northern Railway Company approving the agreement of consolidation of said companies, filed November 10, 1879.

I certify that the above is the transcript of testimony taken in the above-entitled case, as furnished me by the stenographer, and I believe it to be correct.

GEO. H. SHIELDS,
Master p. h. v.

July 24th, 1886.

262 In the Circuit Court of the United States for the Eastern District of Missouri.

CITY OF ST. LOUIS, ST. LOUIS, KANSAS CITY and Colorado R. R. Co., Intervenors in Case of Central Trust Company of New York *et al.*, Complainants, *vs.* WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*, Defendants.	Consolidated Cause. In Equity. Nos. 2357 and 2464.

To the Honorable David J. Brewer, circuit judge of the United States circuit court, eighth judicial circuit:

I have the honor to report in the above-entitled matter as follows:

In accordance with the order of reference herein, I have heard testimony, which was taken down by a stenographer and reduced to writing and is herewith returned, together with all the exhibits therewith connected. The receivers' counsel asked and were granted leave to file an answer herein, but upon reconsideration they declined to do so, and the matter was heard on the bill.

Treating the matter as an application for a preliminary injunction, as if on bill and affidavit and counter-affidavit, and
263 understanding the reference to be for the purpose only of information to your honor, and following the terms of the order that I should set forth the facts as well as my conclusions of law on the bill, I have deemed it more logical to set out the same under the following heads and in the following order:

First. Is the Wabash, St. Louis and Pacific Railway Company bound to permit the use of its track and right of way by other railroads from the north line of Forest park to Eighteenth street (the Union depot), in the city of St. Louis?

Second. Is the St. Louis, Kansas City and Colorado railway such a railroad as is contemplated in the contracts in controversy?

Third. If the intervenor is entitled to use the Wabash right of way and tracks, what would be a fair and equitable compensation for the use thereof?

Fourth. Under what rules and regulations should the use be enjoyed, if granted?

Fifth. Are the intervenors entitled to a mandatory injunction *in limine?*

And in treating the matter in this order I shall endeavor to give the facts as well as my conclusions of law, as presented by the contending parties, under each head respectively.

I.

The General Assembly of the State of Missouri in 1874, by an act approved March 25th, 1874, found in the Session Acts of the State of Missouri, adjourned session, 1874, page 371, established a public park "for the people of the county of St. Louis, to be called Forest park," which lies west of the city of St. Louis and
264 contains 1,372 acres, giving the county court of St. Louis county the authority to purchase or condemn lands for that purpose. Section three contains this proviso: "Provided that nothing in this act shall prevent the St. Louis County railroad from using and occupying a right of way of the width of not more than seventy feet through the northeastern portion of said Forest park. Said railroad shall only enter the park through Duncan's subdivision on the east side of said park, and, running westerly on the north side of the River Des Peres, shall pass out of said park at a point on the northern line thereof east of Union avenue; and provided further, that no switch or siding shall be constructed by said railroad company in said park, nor shall more than one depot be established in said park, and that shall be for passengers only; and provided further, that the grade of said railroad as far as the same runs through said Forest park shall be approved by said park commissioners." The county court was authorized to issue bonds to the county and to raise the money to pay the same by taxation, with which to pay for said park. Section seven provided for a board of park commissioners, and that "said board shall have power to lay off, improve, adorn, and generally govern and control the use of said park and the avenues surrounding the same, and this board shall appoint and dismiss all officers and agents, prescribe their powers and duties, and make agreements, rules, and regulations therefor." The bill in this case avers that prior to the 11th day of August, 1875, the St. Louis County Railway Company was the owner of the right of way through said park, commencing at a point on the north side of said park where Union avenue
265 intersects said park, running in a southeasterly direction through said park to the eastern line of the same; thence in the same direction to said Eighteenth street, in the city of St. Louis, at said Union depot.

It appears from the evidence of Andrew McKinley (p. 33) that there was a great deal of discussion and that there was quite a controversy about where the road should run under the proviso above quoted, which lasted several weeks. Mr. McKinley further testifies (p. 33) that the proviso was intended to protect the park against the invasion of all railroads unquestionably. I put it there myself. The evidence does not show how the St. Louis County rail-

road acquired its right of way through the park, but a fair inference from the testimony and the proviso in the act is, I think, that it acquired a right of way before the passage of the act. On the 11th day of August, 1875, there was an agreement made between the St. Louis County Railroad Company and the St. Louis, Kansas City and Northern Railway Company, which is attached to the bill as Exhibit "A." On the same day another contract was made between the commissioners of Forest park, the St. Louis County railroad, and the St. Louis, Kansas City and Northern Railway Company, which is attached to the bill as Exhibit "B;" which latter agreement, in the 12th article thereof, refers to the first-mentioned agreement; and on the same day the St. Louis County Railroad Company made a deed to the St. Louis, Kansas City and Northern Railway Company of its right of way through the park and to Eighteenth street, in the city of St. Louis, so far as it had acquired it, which deed recites that it is "made in pursuance of the terms of a certain contract
266 made and executed by and between the parties of the first and second parts hereto and dated August 11th, A. D. 1875." The evidence shows the right of way thus sold was not continuous, but over property separated by considerable distances. (See chart A.)

Speaking of this tripartite agreement between the two railroads and the board of Forest park commissioners, the testimony of Andrew McKinley (p. 32) shows that the St. Louis, Kansas City and Northern railroad "had not acquired any right of way through the park up to the time of this agreement, and that all of the covenants in it were in consideration of the right of way." A consideration of these agreements and this deed is necessary in order to determine the main point in this controversy. The contract between the St. Louis County Railroad Company and the St. Louis, Kansas City and Northern Railway Company recites that the former "had acquired the title or right of way over certain pieces of land designated on chart A, which is in evidence, and that the St. Louis, Kansas City and Northern Railway Company, for the purpose of reaching the Union depot in the city of St. Louis, Mo., and other purposes, desiring and requiring a right of way and real estate necessary to establish and maintain its route thereto forever over a part of the right of way and real estate of the St. Louis County railroad, as well as over the lands of others, and having the power under the laws to acquire a right of way along its said established route, either by purchase, condemnation, or otherwise, and along and over the lands of the party of the first part or others and through Forest park, as well as outside thereof," and desiring "an amicable adjustment of all differences and conflicting claims
267 and rights, therefore the parties, each for itself, its successors and assigns, do covenant, promise, and agree as follows." Then follows the contract by which the St. Louis County Railroad Company agrees "to sell to the St. Louis, Kansas City and Northern Railway Company out of the lands owned by it and designated on said chart A a strip twenty-eight feet in width from the blacksmith shop at the junction of the Olive-street road and the old Bonhomme

road, in St. Louis county, to the northern line of said Forest park; also a strip twenty-eight feet wide from the eastern line of Forest park to the western limits of the city of St. Louis; also a strip thirty feet in width from the said city limits to Tayon avenue or Eighteenth street, in the city of St. Louis, and also an undivided one-half of all the right, title, and interest of the party of the first part of, in, or to the right of way and of, in, or to any and all other rights, privileges, franchises, powers, and immunities owned by or vested in or enjoyed by, or that may hereafter be acquired, owned by, vested in, or enjoyed by, the St. Louis County railroad in, through, or upon Forest park by any means or from any source whatever." This contract also contains the following provision: "To have and to hold all and singular said lots, rights of way, and other property unto said party of the second part (St. L., K. C. & N. R. R.), its successors and assigns forever, and all the rights, privileges, and franchises, powers, immunities, improvements, and appurtenances thereto belonging or in anywise appertaining." The contract further provides that the St. Louis, Kansas City & Northern railroad should permit the trains of the St. Louis County Railway Company
268 to pass through a tunnel and cut to be made by the St. Louis, Kansas City and Northern railroad, extending from the eastern line of said park, under the same regulations, etc., as agreed upon in the contract concerning trains in said park and elsewhere, and provided, further, that the use and enjoyment of the rights, privileges, and franchises, etc., through and upon Forest park and in and through and upon said proposed tunnel and cut should be commonly and jointly used by the parties thereto, their successors and assigns. The contract also provided that at two other points, to wit, Compton avenue and Tayon avenue, that the St. Louis County railroad should have the right to lay one rail, if necessary, on the property conveyed by it to the St. Louis, Kansas City and Northern railroad. For and in consideration of the covenants in said agreement contained the St. Louis, Kansas City and Northern railroad were to pay to the St. Louis County railroad $125,000.00, as provided in the agreement. The agreement further provides as follows: "Whereas under this agreement and a certain agreement between the parties hereto and the commissioners of Forest park, of even date herewith, the party of the second part (*i. e.*, St. L., K. C. & N. R. R.) is about to, and hereby, in consideration of the covenants of the party of the first part hereinafter particularly set forth and of the covenants and agreements of said commissioners of Forest park in said agreement with them contained, does, covenant and agree to construct and maintain a railroad bed and road in, upon, and through said Forest park and the tunnel and cut hereinbefore specified, according to certain plans and specifications agreed upon and according to the terms and conditions of said agreement with said com-
269 missioners for the joint use of both parties hereto, their several successors and assigns." In consideration of all the premises and as an inducement to said party of the second part (*i. e.*, St. L., K. C. & N. R. R.) to proceed with said construction and maintain, &c., the St. Louis County Railway Company agreed to

pay to the St. Louis, Kansas City and Northern railroad within two years one-half of the actual cost of the construction of said road-bed through said park and said tunnel and cut. Unless it should decline to do so and deliver to the St. Louis, Kansas City and Northern railroad a deed granting to it and its successors and assigns "all rights and title, etc., it may have in said road-bed, road, or property in said park, tunnel, and cut free from incumbrances," and if said election should not be made within the time specified, the St. Louis County Railway Company agree to pay, in addition to the one-half cost of construction, one-half of the actual cost of maintaining the said road-bed, etc.; and it was further covenanted that if the St. Louis County Railway Company, its successors and assigns, should fail to make such payments on demand after due, etc., "then all the rights, privileges, franchises, powers, immunities, improvements, and property of said party of the first part (*i. e.*, St. L. County railway) in, through, or upon said Forest park and into, through, or over or upon said tunnel and cut shall become, by virtue and force of said failure and refusal, without further process or proceedings, forfeited and belong to said party of the second part, its successors and assigns;" and the St. Louis, Kansas City and Northern railroad was thereupon "authorized and empowered to at once
270 enter upon the sole and absolute possession and enjoyment of all said rights, privileges, franchises, powers, immunities, improvements, and property to the exclusion of said party of the first part, its successors and assigns;" and the said St. Louis County Railway Company further bound itself under such circumstances to convey all its rights, etc., by deed; and it was further covenanted that the St. Louis County railroad might elect within two years to lay a third rail for a narrow-gauge track through said park, tunnel, and cut in a manner not to interfere with the running of said trains of the St. Louis, Kansas City and Northern railroad.

The counsel for the receivers admitted that the St. Louis County railway built no track or railroad between Eighteenth street and the north line of Forest park; that it never built or operated any railroad at all, and that it failed or refused to pay on demand to the St. Louis, Kansas City and Northern railroad or the Wabash any part of the cost of construction of its railroad through the park or elsewhere (pp. 60–61). It is evident that under the contract now under consideration, by reason of such failure to pay, that all the rights, privileges, etc., of the St. Louis County railway in, through, and upon Forest park and in, into, through, over, or upon said tunnel or cut became the property of the St. Louis, Kansas City and Northern Railroad Company. The counsel for the receivers claim that the legal effect of this contract is an agreement on the part of the St. Louis County Railway Company to convey a part of certain property which it then owned to the St. Louis, Kansas City and Northern Railroad Company, and that in the tunnel and cut through the park and at
271 the points of Compton avenue and Tayon avenue both roads should have the right to a joint and common use of the right of way, but that this contract between the parties did not extend

eyond the joint use mentioned and must be confined practically to an agreement for the joint use of the road through the park, the tunnel and cut, and no further. It is evident that by virtue of the payment of the $125,000 and the other considerations the St. Louis, Kansas City and Northern railroad obtained an undivided one-half of the interests of the St. Louis County railway through the park, and that the St. Louis County railway reserved the right to use certain other portions of the road jointly with the St. Louis, Kansas City and Northern railroad, provided it elected to pay one-half of the cost of the construction thereof. It is also evident that by the failure to so elect and to so pay *that* all of the rights reserved to the St. Louis County Railway Company by agreement passed to and became absolutely the property of the St. Louis, Kansas City and Northern railroad. The construction contended for by the receivers' counsel might be perhaps correct, considering this agreement between the two roads by itself; but it refers to and practically makes a part of that agreement the agreement between the commissioners of Forest park and the two roads, made on the same date, and it must be observed that the St. Louis, Kansas City and Northern railroad agrees to build its road through the park and tunnel and cut, not only in consideration of the covenants and agreements of the St. Louis County railroad, but of the covenants and agreements of the commissioners of Forest park in said agreement with them contained.

272 We must therefore examine in connection with this agreement the tripartite agreement between the park commissioners and the two roads in order to ascertain the intention of the parties.

This tripartite agreement is quite lengthy and minute in its details as to construction and management of the road, but it will not be necessary to examine critically the whole of said agreement. The first paragraph provides that "the Forest park commissioners, in consideration of the relinquishments and agreements and stipulations hereinafter contained on the part of the party of the second part (*i. e.*, St. L. County railway), do hereby accept and approve the line and grade of said railroad as laid down and described upon the plat and profile hereto attached and forming a part of this agreement, and said line and grade, in case there is no forfeiture of this agreement, is hereby fixed as the sole and finally established right of way to which said party of the second part is entitled by statute or otherwise through said park or any part thereof, and the width of said right of way, as established by statute, is hereby reduced from seventy feet and fixed at forty-two feet between its outer points," etc., etc. The St. Louis County railroad in the next paragraph of the contract relinquished twenty-eight feet off the seventy feet established by statute for its right of way through Forest park except in case of forfeiture, when the party should be restored to their rights as if the agreement had never been made. What is meant by "the right of way established by statute" is difficult to understand, as the proviso in the Forest park act hereinbefore

quoted says "that nothing in this act shall prevent the St.
273 Louis County Railway Company from using and occupying a right of way of the width of not more than seventy feet through the northeast portion of said Forest park." This proviso neither established a definite line nor a definite width of right of way, but permits the St. Louis County railway to use and occupy a right of way through a portion of the park within certain limits, not to exceed seventy feet in width. No other statute than this has been called to the attention of the master.

This agreement has attached to it two plats, one showing "the alignment of the St. Louis County railway through Forest park" and the other showing "a profile of the St. Louis County railway through Forest park, showing grades as adopted June 8th, 1875." This profile shows heavy excavation work, and also heavy embankment work, throughout nearly the entire line through the park. The master is of the opinion that the legal effect of the Forest park act and of the first two paragraphs of the tripartite agreement is for the first time definitely to establish the line and grade of the St. Louis County Railway Company as contemplated in the Forest park act, and must be taken as a settlement between the park commissioners and the St. Louis County railway of its rights under the proviso in the Forest park act. If this be true it necessarily follows that the line and grade of said railroad became the property of the St. Louis County Railway Company subject to all of the conditions and limitations contained in said tripartite agreement. The first, second, third, fourth, fifth, sixth, seventh, and eighth provisions of this tripartite agreement provided for the details of constructing the road through the park, as well as beyond the park. The ninth article
274 of said contract is in the following words: "And said party of the second part (*i. e.*, St. L. Co. R. R.) shall permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park and up to the terminus of its road in the city of St. Louis upon such terms and for such fair and equitable compensation to be paid to it therefor as may be agreed upon by said companies." By the tenth article the St. Louis County railway concedes that its right of way through the park is not exclusive nor to be considered to limit the power of the park commissioners to grant a right of way to other railroads in other portions of the park. The eleventh article provides that the agreement on the part of the two railroad companies shall, within a reasonable time, as soon as practicable, be ratified by a majority of the stockholders of said railroads. The twelfth article recites "that for the purpose of enabling the St. Louis, Kansas City & Northern railroad to reach the Union depot at St. Louis, Mo.," an amicable arrangement for a right of way outside of and through Forest park was made between the two railroads, and in pursuance thereof they are to "enter upon and enjoy the right of way and all the rights, privileges, immunities, powers, improvements, and property belonging to or vested in or that may belong to or be vested in the party of the second part (*i. e.*, St. L. County Railway Company) in common in and upon and through said park under certain regu-

lations, terms, and conditions agreed upon by and between said parties, and that as the St. L., K. C. & N. R. R., in further pursuance of said last-named agreement, was about to construct a
275 railroad through the park," etc.: Now, therefore, in view of the premises and as inducements to said party of the third part ("to wit, the St. Louis, Kansas City & Northern railroad") to proceed as intended, the party of the first part ("to wit, the board of Forest — commissioners") does hereby grant and convey unto and license and permit the said party of the third part, its successors and assigns, to have, hold, and use and enjoy said right of way in, upon, and through said park in common with and to be held and enjoyed jointly with said party of the second part and its assigns on the terms of the said contract between them and under the same terms and conditions as are hereby and hereinbefore imposed upon said party of the second part (to wit, the St. Louis County Railway Company), and which are hereby assumed by said party of the third part (to wit, the St. Louis, Kansas City and Northern Railroad Company), "as to improvements, except as to building a depot and switch in said park, which the party of the second part is to do itself, or in case said party of the second part, its successors or assigns, should forfeit its said rights, privileges, and franchises in, upon, and through said park, or from any cause cease to have, maintain, or enjoy the same, then it is hereby agreed and covenanted that the party of the third part (*i. e.*, St. L., K. C. & N. R. R.) shall not also be excluded from said park, but shall, with its successors and assigns, continue to have, maintain, and enjoy all of said rights, privileges, immunities, franchises, improvements, and property on the terms hereinbefore set forth continuously and forever."

Four things must be observed about this twelfth article:
276 First, that it was for the purpose of enabling the St. Louis, Kansas City & Northern railroad to reach the Union depot; and, second, to enjoy jointly with the St. Louis County railway the rights and privileges obtained by it from the St. Louis County railway; and, third, that in the event of a forfeiture of the rights and privileges and franchises of the St. Louis County railway that the forfeiture should not affect the St. Louis, Kansas City & Northern railroad, but that all of the franchises should immediately pass to and be enjoyed by the St. Louis, Kansas City & Northern railroad; fourth, that the St. Louis, Kansas City & Northern railroad regarded the license and consent of the board of park commissioners necessary for it to accomplish these objects. As the twelfth provision carefully provides for these objects "under the same terms and conditions as are hereby and hereinbefore imposed upon said party of the second part," and, again, the latter part of the clause confers the entire privileges on the St. Louis, Kansas City & Northern railroad "on the terms hereinbefore set forth," the evident intention and agreement of the parties was that whether the roads used the right of way jointly or whether it should pass to the St. Louis, Kansas City and Northern railroad and its successors and assigns that it should be burdened with the limitations set forth in the contract,

and especially with the limitation contained in the ninth section as to permitting other railroads to use the right of way through the park and to the Union depot. The counsel for the receivers contend that as the words "under the same terms and conditions as are hereby and hereinbefore imposed upon the said party of the second part" are followed by the words "and are hereby assumed by the said party of
277 the third part as to improvements, except as to building a depot," etc., that the evident intention of the parties was that the St. Louis, Kansas City and Northern railroad was only bound to make the improvements which it agreed to make in the contract between it and the St. Louis County Railway Company, and that this construction excludes the ninth article of the tripartite contract as a condition. The master does not agree to this construction for the following reasons: First. That it was unnecessary for the St. Louis, Kansas City and Northern railroad to expressly assume any of the conditions. If it accepted the license and grant and use of the right of way it could only do so subject to the conditions imposed. Second. If this construction is correct, then the fourteenth section of the contract was entirely unnecessary, as it provides in detail in regard to the subject of improvements. My construction of the words "as to improvements," in the twelfth section, is this, that the park commissioners granted the franchises and privileges to the St. Louis, Kansas City and Northern railroad "under the same terms and conditions as are hereby and hereinbefore imposed upon" the St. Louis County Railway Company. Among these terms and conditions was the obligation on the part of the St. Louis County railway to build a depot and switch in the park, and by the contract between the two railroads the St. Louis, Kansas City and Northern railroad was to immediately construct its railroad through the park, tunnel, and cut, etc., and that in assuming the terms and conditions imposed upon the St. Louis County Railway Company it wishes to except as to improvements the building of said depot and switch in said park.

278 This view is strengthened by the fact that in the latter part of the twelfth article, when providing for the entire franchise to become vested in the St. Louis, Kansas City and Northern railroad, "on the terms hereinbefore set forth, continuously and forever," there are no exceptions of any kind. If, in addition to this, we remember that the only thing which the St. Louis, Kansas City and Northern Railroad Company had to do immediately was to construct its railroad, that was the only thing it had then to assume, and in so doing it properly accepted the building of the depot and switch, which was part of the improvements.

The fourteenth article of this tripartite contract refers to the contract between the two railroads of even date, and recites that by that contract the St. Louis, Kansas City and Northern railroad has agreed that it will execute, perform, and comply with all the terms, provisions, and things herein to be done, etc., by the St. Louis County Railway Company "as to said improvements, except the depot and switch in said park;" that therefore the board of park

commissioners accepts the contract of the St. Louis, Kansas City and Northern railroad to comply with the covenant as to improvements, except as aforesaid, in lieu of the said St. Louis County railway, releases it from its obligation, and agrees to take a compliance by the St. Louis, Kansas City and Northern railroad as a compliance by the St. Louis County Railway Company.

It will be further noticed that by this tripartite agreement the board of Forest park commissioners agrees to do at its own expense certain work connected with the building of said railroad through said park.

279 It appears from the testimony of Andrew McKinley, the president of the board of Forest park commissioners, that the board contributed $39,000.00 or $40,000.00 towards the construction of the road through the park, in building a bridge and culverts, and building walls on each side of the track (pp. 31–34, 35), which expenditures would not have been necessary except for the building of the railroad (pp. 35–38, 39).

It also appears from the testimony of Andrew McKinley that the invasion of the park by railroads would have had a very damaging effect upon the park (p. 33); that there was great apprehension of danger to persons visiting the park on account of the railroad (p. 34); that the contract was intended to protect the park, and to provide for a contingency it doubled the capacity of the track, to provide for more trains passing through, and that therefore they conceded more ground than was necessary and gave the roads a right of forty-two feet (p. 36), and that all points in issue between the parties was settled by the contract (p. 37).

Referring to the deed from the St. Louis County Railway Company to the St. Louis, Kansas City and Northern Railroad Company, which recites that it was "made in pursuance of the contract" heretofore set forth as being made between the two railroads after the conveyance of designated tracts of land, and contains the following clause: "And also the said party of the first part hath conveyed, assigned, and transferred, and by these presents doth convey, assign, and transfer, unto the said party of the second part (St. L., K. C. & N. R. R. Co.) and to its successors and assigns an undivided one-half of all the right, title, and interest of the party of the

280 first part of, in, or to the right of way and of, in, or to any and all other rights, privileges and franchises, powers and immunities, owned by or vested in or enjoyed by or that may hereafter be acquired or owned by, vested in, or enjoyed by the party of the first part in, through, or upon Forest park by any means or from any source whatever, all of which conveyances of the said rights of way in this deed mentioned are made subject to the terms and conditions upon which the same were granted to the party of the first part, as one of the terms on which the right of way through the park was granted to the St. Louis County Railway Company was that it should permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use this right of way through the park and up to the terminus of its road in the city of St. Louis, upon such terms and for a fair and equitable compensation to be paid

to it therefor as may be agreed upon by such companies," the master is of the opinion that, taking into consideration the condition of the parties, the objects sought to be accomplished, and the terms of the contract between the two railroads, and the terms of the tripartite agreement between the park commissioners and the two railroads, and the deed from the St. Louis County Railway Company to the St. Louis, Kansas City & Northern Railroad Company, that the intention of the parties was that there should be but one right of way for railroads through the park, which should be subject to the common use, not only of the two contracting railroads, but such other railroads as might afterwards desire to pass through the park; and that, in order to prevent other railroads from attempting to pass through the park and destroy it for the purpose for which it was
281 established, the board of park commissioners wisely required and the railroad companies assented to the conditions that they would take said right of way subject to the right of user by other roads, not only through the park, but up to the terminus of its road in the city of St. Louis (*i. e.*, Eighteenth street). If the right beyond the park into Eighteenth street to use this right of way had not been reserved for other roads by the park commissioners, it would have been and would be impossible to prevent the park from being marred or destroyed by other roads; but if the park commissioners or the city of St. Louis are able to say to other roads wishing to pass through the park and enter the city of St. Louis, "You shall do so on reasonable terms on the right of way already established through the park and thence to the Union depot," no complaint could be made by the entering road, and the interests of the park and the city of St. Louis would thus be better protected.

It is conceded that by the scheme and charter declared adopted in 1877 that this park and the control thereof and the powers conferred upon the park commissioners passed to and were vested in the city of St. Louis.

It appears in evidence (p. 62) that the St. Louis, Kansas City & Northern Railroad Company on the 11th day of November, 1879, was consolidated with other companies under the laws of this State and other States, and became the Wabash, St. Louis & Pacific Railway Company. The bill avers that on the — day of ——, 1879, the said St. Louis, Kansas City & Northern Railroad Company, then in exclusive possession of said right of way and railroad, duly assigned, conveyed, and transferred all its property, rights, and fran-
282 chises of whatever nature to the defendant, The Wabash, St. Louis & Pacific Railway Company, and since said date the latter company has used, enjoyed, and operated all the property formerly owned by said St. Louis, Kansas City & Northern Railroad Company, including the said railroad from said Union avenue to said Eighteenth street, and now is in the exclusive possession and enjoyment thereof.

The counsel for the receivers admit that this allegation is true, and that it was acquired on the 11th day of November, 1879 (p. 74).

It also appears in evidence that the limits of the city of St. Louis have been extended and now include the whole of Forest park.

The counsel for the receivers contend that if these papers bear the construction put upon them by the counsel for the intervenor that the Wabash Railroad Company is not bound by them; that the covenant contained in the ninth article of the tripartite agreement is a mere personal contract of the St. Louis County Railway Company, and that it does not run with the land, and that therefore the assignee is not bound by the covenant; that such a covenant cannot be annexed to things not granted, and that as the park commissioners could only grant a right of way through the park that they could not annex a covenant requiring the St. Louis County Railway Company to permit the use of its tracks east of the park into the Union depot, and cites the case of Kepler *vs.* Bailey, 2 Miln. and K., 517; Narcross *vs.* James, Am. Law Register, 1886, p. 64; Spencer's case, 5 Coke, 16. The master is of the opinion that these cases do not apply to the case under consideration for the following reasons: First, the St. Louis, Kansas City and Northern
283 railroad cannot be considered under the circumstances simply the assignee of the St. Louis County railroad as to this property, but was an original contractor, having signed the tripartite agreement as a party thereto, and it obtained whatever rights it had through the park by virtue of that contract; second, if the St. Louis, Kansas City and Northern railroad should be considered as taking the property solely by virtue of its contract with the St. Louis County railroad and by virtue of the deed from the latter road, we find that the whole of the property conveyed to it by the St. Louis County railroad (that through the park and that outside of the park) was conveyed "subject to the terms and conditions upon which the same were granted to the party of the first part," this being a covenant in the deed itself, limiting the estate taken by the St. Louis, Kansas City and Northern railroad.

In the brief filed by the counsel for the receivers he cites a case where A, being the owner of a block of ground, grants a portion of it to B upon condition that neither B, his heirs or assigns, will permit a livery stable or brewery to be erected on the lot conveyed. He then says, "B takes only a qualified estate in the premises; his dominion over the property is not complete, and, not being able to convey any greater estate than he received, his heirs and assigns necessarily take subject to the conditions on which he held." Now, by virtue of the deed from the St. Louis County Railroad Company to the St. Louis, Kansas City and Northern railroad it took all of the property through the park and this side of the park from the
St. Louis County railroad, subject to the conditions on which
284 it was conveyed to the latter road, and one of these conditions was, so far as the park and up to the Union depot was concerned, that it should permit other roads to use its right of way through the park and to the Union depot. Another view strengthens this position in my opinion: the St. Louis, Kansas City and Northern railroad now holds the entire franchise through the park and through the tunnel and cut and through the points reserved on

Tayon avenue and Compton avenue by virtue of forfeiture on account of the non-payment of one-half of the cost of construction by the St. Louis County railroad, and so far as the park is concerned it gets the benefit of this forfeiture by virtue of its original contract with the park commissioners, subject to the ninth section of the tripartite agreement.

Although the right of way conveyed by the St. Louis County railroad through the park and to Eighteenth street was not continuous, but in separate parcels, it was contemplated by all of the parties that the intervening ground would be obtained by the railroads and constitute a continuous right of way for railroad purposes, and all of the covenants of the contracts and deed were made with that understanding and really to effectuate that purpose, and the contracts and the deed are so interlaced with each other as to require the consideration of all of them in the construction of any. Such being the case, the master is of the opinion that the right of way from the north line of the park into the Union depot must be considered as the subject-matter under consideration by the parties and ought to be treated as one whole.

285 Under the consolidation acts of the State of Missouri, sections 789 and 790, Rev. Stat. Mo., 1879, consolidation between railroads is permitted to be made conferring on the consolidated road "all the powers, rights, privileges, and immunities and subject to all the obligations and liabilities to the State or otherwise which belonged to or rested upon either of the companies making such consolidation." As the Wabash road, according to this record, acquired the rights of the St. Louis, Kansas City and Northern railroad by consolidation, it took its property subject to all the obligations and liabilities of the latter company to the State or otherwise—that is, all the liabilities and obligations of every kind to which it was subject. One of these liabilities, according to my construction of the agreements herein, was the privilege for other roads to use its right of way through the park and up to the terminus of its road at Eighteenth street upon fair and reasonable terms.

The relation between the St. Louis, Kansas City and Northern railroad and the Wabash railroad is different from that of a purchaser by deed. All obligations and liabilities of the former road are by law imposed upon the latter—not only covenants running with the land, but personal covenants. The changed relations in the consolidating roads does not affect the obligations of any one of them in its relations to the State or outside parties. If the St. Louis, Kansas City and Northern railroad, as an original contractor, became subject to the ninth article of the tripartite contract, then by consolidation the Wabash became subject thereto under the statute and cannot claim that "as assignee" it is not bound by all
286 the covenants of the former, even though they be held merely personal covenants.

Having thus given the facts and my conclusions of the law on the contract relations of the parties to this bill, I am of the opinion that under the facts and the law the Wabash Railroad Company

holds its right of way through the park and to the Union depot subject to the right reserved by the park commissioners for the benefit of the citizens of St. Louis and the public; that other railroads should use this right of way upon reasonable rules and regulations and for fair and equitable compensation.

II.

Is the St. Louis, Kansas City and Colorado railroad such a railroad as is contemplated in the contracts in controversy and is it entitled to avail itself of the right to run over the Wabash tracks?

The articles of organization of the St. Louis, Kansas City and Colorado railroad have not been offered in evidence. The evidence of S. T. Emerson, the civil engineer of that road, shows that this road has a track laid from Forsyth junction to beyond Creve Cœur Lake, in St. Louis county, and a branch this side of the lake; in all, about twenty-one miles of track. In addition, they have in St. Louis and Franklin counties ten miles of completed grade, and a force working on the balance, and several miles of completed grade in Kansas, from the city of Fort Scott this way, and a contract let from Fort Scott towards St. Louis of about twenty-five miles, which is now being worked; that they expect to complete by November next their road to Union, in Franklin county, about 54½
287 miles; that the road between Forsyth junction and Creve Cœur Lake is now ready for operation (pp. 17 and 18); that they have graded three miles of the road in the State of Kansas, from Fort Scott in the direction of Clinton, in the State of Missouri (p. 25). The road is contemplated to run through St. Louis county, Franklin, Gascouade, Osage, Maries, Miller, Cole, Morgan, Benton, Henry, St. Clair, Bates, and Vernon counties, in the State of Missouri, and in Bourbon county, in Kansas, and then southwesterly to the southern tier of counties in the State of Kansas, and then directly west through the southern tier of counties (p. 26); that they have expended for work in Missouri about $300,000.00 (p. 27); that the profile map of the intended line has been filed in St. Louis county and Franklin county, in Missouri, and in Bourbon county, in Kansas (p. 27); that they have out surveying parties west from Union towards Fort Scott, sixty miles, and have surveyed the road from Bourbon county east to Clinton, sixty-five miles; that they have no actual location to any extent west of Fort Scott, Kansas (p. 28); that the reason they have done more work at the Missouri end than elsewhere was because of conflicts with the Missouri Pacific, attempting to take their right of way (p. 29).

It seems to have been conceded by both parties that the corporation was organized under the Kansas laws. The receivers' counsel object that because this road has no constructed and operating railroad in the State of Kansas that it cannot come into the State of Missouri and claim the benefit of this contract with the Wabash. It has been decided that a *de facto* railroad corporation may exercise a right of eminent domain, and as a rule the legal existence

288 of a *de facto* corporation can be questioned only by the State in a direct proceeding for that purpose.

Brookville *vs.* McCarty, 3 Indiana, 892.
A. & C. R. Co. *vs.* City of Lawrenceburg, 56 Indiana, 80.
McCauley *vs.* R. R. Co., 83 Ills., 348.
Reisner *vs.* Strong, 24 Kansas, 410.
Catholic Church *vs.* Tobbein, 82 Mo., 418.

It has been held in Missouri that a railroad organized under the laws of Arkansas, under section 790, Rev. Stat. 1879 (passed in 1870), had all the powers of a railroad company organized under the laws of this State and could condemn land for its right of way.

Gray *vs.* St. L. & St. Francisco R. R., 81 Mo., 135.

In 1881 the General Assembly of the State of Missouri amended section 790 of the Revised Statutes so that it reads as follows: "Any railroad company duly incorporated and existing under the laws of any State of the United States may extend, construct, maintain, and operate its railroad into and through this State, and for that purpose shall possess and exercise all the rights, powers, and privileges conferred by the general laws of this State upon railroad corporations organized thereunder, and shall be subject to all the duties, liabilities, and provisions of the laws of this State concerning railroad companies as fully as if incorporated in this State." (See Session Acts State of Mo., 1881, pp. 75, 76.)

Section thirteen of article twelve of the constitution of the State of Missouri does not affect any right of the intervenor to avail itself of the use of the right of way as claimed in this petition.

289 The master is therefore of the opinion that the St. Louis, Kansas City and Colorado railroad is such a railroad as is contemplated in the contracts in controversy, and is legally entitled to avail itself of the right to use the right of way of the Wabash, St. Louis & Pacific railway "from the north line of Forest park to Eighteenth street, in the city of St. Louis," under reasonable regulations and terms as may be agreed and upon such terms and for such fair and equitable compensation to be paid to it therefor as may be agreed upon between said companies."

III.

If the intervenor is entitled to the use of the Wabash right of way and tracks, what would be a fair and equitable compensation for the use thereof?

The order of reference herein requires me to report a sum that would be a fair and equitable compensation for the use of the right of way and tracks of the Wabash, St. Louis & Pacific Railway Company, as prayed for in the bill of complaint. On this question there is such a conflict of testimony as to be almost impossible to arrive at a basis. The complainants' counsel claims that the true measure of compensation is first to find the cost of the track and right of way in question and to allow interest on this sum at the rate of six per cent. per annum, the legal rate of interest in Missouri, and to

add to this the cost of maintenance, and then to divide this sum on a wheelage basis—that is to say, in proportion to the number of cars run by each road over said track, settlements to be made on this basis every thirty days.

On the other hand, the receivers' counsel claim that a fair
290 and equitable compensatien is to value the right of way and tracks proposed to be used at their present value as a railroad, to allow interest on this value at six per cent., and to require the St. Louis, Kansas City & Colorado railroad to pay one-half of said interest and to pay in addition thereto their proportion of the cost of operating and maintenance of said right of way and tracks on a wheelage basis.

In support of their theory the complainants' counsel introduced testimony of S. T. Emerson, the chief engineer who built the St. Louis, Kansas City and Northern railroad from Ferguson through the park to the Union depot. He stated that the cost of the whole of said branch road was $840,000.00, including the right of way and everything, and that that portion of the road from Eighteenth street or the Union depot to the north line of the park cost $360,000.00 (p. 9); that he had recently examined the track, and that the superstructure, the ties, iron, etc., had greatly depreciated in value, and that the depreciation amounted to about fifty per cent. (p. 13); that the difference in the value of the track as it is now and its cost in the first instance was about $25,000.00 less on account of the depreciation, and that the superstructure originally cost about $40,000.00.

Deducting this depreciation at fifty per cent, $20,000.00, from the original cost would leave $320,000.00. He also testifies that the cost of maintaining a mile of single-track railroad, such as the Wabash, would not exceed $600.00 per mile a year. Taking this basis, four miles and 224 feet, for maintenance per year, would be about $2,400.00 (p. 16). Mr. Emerson has been in the railroad busi-
ness as an engineer, partly in operation and partly in con-
291 struction, for 34 or 36 years, and he gives his opinion that a fair and equitable compensation in a case where one railroad has a right under a contract to use the track of another would be to divide on a wheelage basis the interest on the first cost of the property and the cost of maintenance (p. 16), with a settlement every thirty days (p. 20). On cross-examination he says (p. 22) that he arrived at the cost of the road by taking the amount of money he had spent in construction and consulting the auditor as to the balance of the money that had been expended, but could not detail how much was for right of way and how much for construction. He says (p. 23) that this was the cost of the road up to about July, 1876, and does not include the subsequent cost.

On the other hand, Col. How, the general agent of the receivers of the Wabash, states that (p. 91) he was connected with the St. Louis, Kansas City and Northern railroad as secretary and vice-president, and that it was his duty to approve vouchers and keep himself posted with respect to the cost of that railroad between the Union depot and the north line of the park, and that his recol-

lection is that it cost between $1,000,000.00 and $1,100,000.00; that the whole cost from Ferguson into the Union depot was $1,250,000.00, and that a liberal estimate of the cost from the north line of the park to Ferguson would not exceed $250,000.00 (p. 91).

It is also in evidence that subsequent to the original building of this branch the St. Louis, Kansas City and Northern railroad and the Wabash road have acquired other property on which they built side tracks, switches, and other things necessary for the operation of their road.

292 As both these gentlemen are supposed to be in a position to know the cost, and as one limits the cost to about July, 1876, it is possible that the difference arises from the sum spent after that date.

In regard to the present value of the railroad there is the same conflict of testimony. Col. Talmage, the general manager of the road for the receivers, testifies that some time ago, at the request of the C., B. & Q. road for an entrance into the city over these tracks, he had his engineer go over the value and costs of the property and get up the figures, and went over the same with him, and that he considered the present value of the property to be between $1,250,000 and $1,500,000, and he based this estimate upon the property having been purchased some time ago and without the improvements with which a similar right of way parallel would be burdened. He states (p. 77) that he would consider a fair valuation of the right of way and superstructure of the Wabash railroad from the north line of the park to the Union depot, with such appurtenances as are necessary to operate it as a railroad in the city of St. Louis, side tracks, etc., to be worth at least $1,500,000 (p. 77). He says (p. 80) this valuation includes the property between the west line of the park and Union depot—that is, the real estate and tracks, the side tracks laid thereon, and other appurtenances necessary for doing business. He states (p. 82) that the reason the whole property should be taken in the value is that you cannot do business without the sidings, switches, etc., for the purpose of storing, loading, and unloading cars.

Col. How, in his testimony, values the line as it stands to-day, including the right of way and superstructure and necessary appurtenances from the north line of the park to the Union depot,

293 at $1,800,000, and that if a new line were to be built it would cost fully $2,500,000 (p. 91).

On the other hand, the intervenor introduced Julius Pitzman, John Grether, and L. B. Jones, who are generally familiar with the values of real estate in the city of St. Louis, who put the value on a strip of ground thirty feet wide, as it appears on the plat, chart A, extending east of Forest park thirty feet wide to Tayon avenue (p. 108), at $265,141.00. This is of the real estate alone, simply considered a vacant land, level with the streets, thirty feet wide. These witnesses detailed the manner in which they arrived at this estimate, and said that it does not include anything except the actual value of the land, nor what the railroad might have paid for damages for adjoining property, nor any of the superstructure, nor improvements thereon. There

was no estimate of value of the railroad as a railroad given by any one except Mr. Talmage and Mr. How.

There is quite a wide divergence between the witnesses for the intervenor and the receivers as to the method of arriving at an apportionment between the two companies. Col. Emerson states that it should be divided on a wheelage basis only. J. B. Vandyne, who has been in the railroad business since 1855 and has been general superintendent since 1861, states that in a case where one road by contract has a right to run over the tracks of another it should be divided on the wheelage basis, taking into consideration the maintenance of the road, the interest on the cost of the road, and he gives instances (pp. 45 and 46) where this basis is adopted between roads. In answer to a question by the master (p.
294 47) he states that an additional element to be considered is the value of the track itself.

Charles H. Sharman, who is the superintendent of the Ills. and St. Louis R. R. in East St. Louis, and who is familiar with instances in which railroads run over the tracks of other roads, after stating instances, states that in his opinion a mode of arriving at a fair and equitable basis would be to take into consideration the value of the tracks to be used jointly, in relation to what it cost, and then agree upon a percentage to be paid on that, and add to that amount the cost of maintenance of the track and prorate that; that he would allow six per cent. on the cost and divide the whole on the basis of wheelage (p. 50), and that he knows of no more equitable way of arriving at compensation than the wheelage basis (p. 51). In answer to a question by Judge Hough (p. 57) he states that to some extent the value of the right of way at the time the road was to be used by the other road ought to be taken into consideration.

On the other hand, Col. Talmage and Col. How, who were fully as competent as railroad men as the other witnesses, state that the proper way to ascertain the equitable consideration to be paid by one road for the use of another's tracks is to value the right of way and track and its appurtenances and to require the entering road to pay one-half the interest per annum on this valuation, and in addition thereto to pay on a wheelage basis the maintaining and operating expenses of the right of way and track. Both of these gentlemen gave numbers of instances connected with the Wabash property in which this basis has been adopted, sometimes
295 the Wabash paying this consideration and sometimes receiving this consideration from other roads.

Considering all the circumstances surrounding this case, the master is of the opinion that neither of the bases contended for respectively by the intervenor and receivers is correct. It would be manifestly unjust to permit one road to use the property of another by simply paying interest on the original cost years ago, when the property itself might have increased in value to an enormous extent and the cost of similar facilities to be purchased or condemned anew for the purpose of the entering road would be increased correspondingly. The change of circumstances, the increased facilities for business, the connections, the increased business itself,

are all factors in the problem. It would be manifestly unjust to require a road using the track one-tenth as much as the other to pay one-half of the fixed charges or interest on the value, especially where the contract provides for the use of the road by even other roads than the Wabash and the intervenor. The intervenor must be considered in this matter not simply as a road twenty-one miles long, but a road running throughout the whole length of its projected route, as good faith requires sooner or later it should be built, and with it would come increased business and use of the track.

Endeavoring to extract from the contradictory views and testimony on these points some basis which may be equitable, I think it would be proper to adopt as a basis the present value of the property sought to be used, to allow interest on this sum at the legal rate of interest in the State of Missouri, to wit, six per cent., to add to this the actual expenses of repairs and maintenance
296 of the right of way and tracks and the operating expenses of these tracks, and to divide the whole on a wheelage basis, charging each road in proportion to the number of cars and locomotives run over the tracks by each, the Wabash road to keep an accurate account of such maintenance and operating expenses and each road to keep an accurate account of the number of cars and locomotives run over said tracks by each, and settlement to be made every thirty days between the companies. For the purpose of ascertaining the amount of interest to be paid, I think, from all the testimony, that a fair valuation of the right of way and tracks sought to be and necessary to be used should be fixed at $1,000,000.00. If the court prefers to fix the operating and maintaining expenses at a given sum, I find from the testimony that $600.00 a mile per annum is a fair estimate of such expenses, which would be $2,400.00 a year, for the property sought to be used. In arriving at this conclusion I considered the fact that it could only apply temporarily, until the court can be fully informed as to the value and as to the equity of the suggested basis of division on the final hearing. This question is practically a question of fact, to be decided from all the circumstances of the case as to what would be fair and equitable.

IV.

Under what regulations should the use be enjoyed if granted?

It is considered by the intervenor's counsel and the entire evidence shows that the management of this property must remain with the receivers or the Wabash railroad. A chart has been
297 introduced showing the manner in which these tracks might be used between the two roads, based on the present time-table of the Wabash road. The testimony of Col. Talmage shows that the property could be operated by both roads, but that he would need additional side track room for handling the trains of the intervenor. There is also in evidence a time-table and rules and regulations at present governing the running of the road by the receivers.

The contract between the St. Louis County railroad and the St. Louis, Kansas City and Northern railroad provided that the St.

Louis, Kansas City and Northern railroad should have absolute and sole control of the running and starting and regulating of the time-tables of and for its own trains, and that no train, locomotive, car, or other conveyance of the St. Louis County railroad, its successors or assigns, shall be allowed or attempted to be started or run within eight minutes of the time fixed or stated for the starting, coming in, or running of the train or trains of the St. Louis, Kansas City and Northern railroad, etc., and there shall be twenty minutes time between the starting and coming in of the trains of the St. Louis, Kansas City and Northern railroad, and this matter as to specified times shall be under the sole control and regulation of the St. Louis, Kansas City and Northern railroad.

I therefore recommend that the regulations governing the running of the intervenor's trains, if the right should be granted, should conform to the rules and regulations now in force and such other reasonable rules and regulations as may be hereafter *be* adopted by the Wabash railroad, and that the trains of the intervenor should be so arranged as at least eight minutes should intervene be-
298 tween its trains and the trains of the Wabash road at any point of the road, and that the sole control and regulation of the running of the trains of the two roads should remain with the Wabash, St. Louis and Pacific railroad and its receivers subject to further orders of court if this should be abused.

V.

Are the intervenors entitled to a mandatory injunction *in limine?*

The counsel for the receivers contend that this is such a contract as cannot be specifically enforced against the Wabash road, because the court cannot settle the whole case by its decree, and because there is no mutuality in the contract, and because the court practically would have to make a contract for the parties. To support this proposition they cite Railway Co. *vs.* Railway Co., 22 Am. and Eng. Railway Cases, p. 265; Ripley *vs.* The Marble Co., 10 Wall., 358; Blanchard *vs.* Railway Co., 31 Mich., 43; St. Louis Gas Light Co., 70 Mo., 69. I don't think these cases militate against the intervenor's right here. The contracts between the parties leave the regulations of running the trains under the control of the St. Louis, Kansas City and Northern railroad, providing simply that these regulations shall be reasonable, and the only question left is to ascertain a fair and equitable compensation.

The master is of the opinion that the specific performance of the contract can be decreed and the compensation fixed by the court or its master if the parties fail to agree.

299 See Watson *vs.* Sutherland, 5 Wall., 74.
Express Co. *vs.* R. E. Co., 99 U. S., 109.
Tscheider *vs.* Biddle, 4 Dillon, 55.
Biddle *vs.* Ramsey, 52 Mo., 153.
Hogg *vs.* Vanberkleo, 58 Mo., 202.
Gregory *vs.* Miguel, 18 Vesey, 328.
Gourlay *vs.* Duke of Somerset, 19 Vesey, 429.
Arnold *vs.* Alexander, 44 Mo., 27.

Jackson *vs.* Jackson, 1st Small & Gifford, 184.
Paris Chocolate Co. *vs.* Crystal Palace Co., 3rd Small and Gifford, 124.
Wilkes *vs.* Davis, 3 Merivalle, 509.
Dinham *vs.* Bradford, 5 Chancery Appeals, 519.

The counsel for the receivers also contend that the intervenors are not entitled to a mandatory injunction—first, because they are not in position to avail themselves of it if granted. The evidence shows that the intervenors' railroad connects with the Wabash at Forsyth junction, 3,760 feet from the point where the Wabash enters the park, on the north line thereof, and that no right of way from Forsyth junction to that point has been obtained and no location of road made. The intervenors' counsel reply to this that the receivers positively refuse to permit them to use the road under any circumstances, and cite a letter of July 3rd, 1886, written by Col. How to the attorneys for the intervenor, in which they say: "The receivers, acting under the advice of their counsel, are not disposed to admit that the St. Louis, Kansas City & Colorado Railroad has rights under the tripartite agreement of August 11th, 1875, as claimed by you." "During the receivership we will
300 not consent to the running of independent engines or trains over our line through Forest park and to the Union depot under the management of any other company." They claim that this refusal, together with the insolvency of the Wabash, gives them a right to the order of injunction without compelling them to go to the additional expense — building a road up to the park and then be refused by the court a passage through it.

Mr. High, in his work on injunctions, says: "It is incumbent upon the parties seeking relief by interlocutory injunction to show some clear, legal, and equitable rights and a well-grounded apprehension of the immediate injury to those rights." In section nine he says: "Substantial and positive injury must always be made to appear to the satisfaction of the court of equity before it will grant an injunction." Again, in section 22, he says: "An injunction, being the strong arm of equity, should never be granted except in a clear case of irreparable injury and with full conviction on the part of the court of its urgent necessity."

Citing 1st Bissell, 515.
Citizens' Coach Co. *vs.* Camden R. R., 21 N. J. Eq., 299.

It is conceded that it is not necessary that the wrong should actually have been committed before the court of equity will interfere, and that a threat of a commission of a wrong which is within the power of the defendant would be sufficient grounds to justify the interference.

High on Injunctions, sec. 18.

But it is evident that there is no urgent necessity for this remedy, as the intervenor could not avail itself of the order until it had built its track to the park. It is further evident that no substan-

tial or positive injury would happen to the intervenor by the
301 refusal to permit the use of the track in question until the intervenor was in position to use it.

High on Injunctions, vol. 1, p. 3.
Goodrich *vs.* Moore, 2 Minnesota, p. 21.
Bonaparte *vs.* Camden & Amboy R. R., 1 Baldwin C't C't Rep., 218.

But even conceding that the threatened refusal to permit a passage through the park by an insolvent corporation contrary to contract obligations before the complainant could avail itself of the injunction if granted is ground for an injunction, the master is of the opinion for another reason that a mandatory injunction cannot be granted in this case. Hilliard on Injunction says, sec. 9: "The object of a preliminary injunction is to prevent some threatening irreparable mischief until an opportunity for a full and deliberate investigation."

See also Fry on Specific Performance of Contracts.
Sec. 769, High on Injunctions, sec. 4.

Speaking of mandatory injunctions, Eden on Injunctions, p. 51, says: "It must, however, be exercised with caution and is strictly confined to cases where the remedy at law is inadequate for the purpose of justice, and the restoring things to their former condition is the only remedy which will meet the requirements of the case."

Bispham Equity, sec. 400, says: "A mandatory injunction is one that compels the defendant to restore things to their former condition and virtually directs him to perform an act. A mandatory injunction is granted only with great caution, and the courts
302 are particularly reluctant to grant such injunction upon an interlocutory application and before a final hearing."

See also Hull *vs.* R. R. Co., 12 Am. & Eng. Railway cases, where the subject is carefully gone over by the supreme court of Tennessee. See also reasoning of Judge McKennon in Camblos *vs.* P. R. R., 4 Brewster, 563, and McCluney *vs.* Kellogg, 2 Woods, 13.

In opposition to this the intervenor's counsel cited many cases in which the United States courts have granted mandatory injunctions *in limine*, and particularly the case of The Cole Silver Mining Company *vs.* Virginia and Water Company, 1st Sawyer, 685, in which Judge Field overruled Judge Sharswood; in Auderied *vs.* Philadelphia R. R., 68 Penn., 380.

In this case the defendant, by means of a tunnel run into a mountain at a lower altitude than the complainant's tunnel, wrongfully intercepted water appropriated by the complainant flowing in its said tunnel, and a preliminary injunction was granted restraining the continuance of such diversion, even though obedience to the injunction rendered it necessary for defendants to build a bulkhead or dam across the tunnel. See 1st Sawyer, 470. This case came before Judge Field on a motion to dissolve the injunction on the authority of the 68th Penn. Stat., 370. Judge Field declined to do so, and summed up his conclusion in the following words: "Undoubt-

edly the general purpose of a temporary injunction is to preserve the property in controversy from waste or destruction or disturbance until the rights and equity of the contesting parties could be fully considered and determined. Usually this could be effected by restraining any interference with it; in some cases the continu-
303 ance of the injury, the commencement of which has induced the invocation of the authority of a court of equity, would lead to waste and destruction. It is just here when the special jurisdiction of the court is needed to restore the property to that condition in which it existed immediately preceding the commencement of the injury, so that it may be preserved until final decree." Judge Field arrives at this conclusion on the authority of Lane *vs.* Newdegate, 10 Vesey, 193, where the injunction was mandatory, requiring the restoration of stop gates, etc., as existed previous to the lease; and Robertson *vs.* Byron, 1st Brown's Chan., 588, where the injunction was mandatory, restraining defendant from so using his flood gates, etc., as to prevent water flowing to the mill in regular quantities, as it had ordinarily done before; and Ruskin *vs.* Huskinson, 4 Simon, 13, where the injunction was to prevent the continuance of erecting stables and from preventing such part of the building already erected from remaining; and Hepburn *vs.* Lorden, 2 Henning and Miller, 345, where the defendants were restrained from allowing inflammable, damp jute deposited on premises adjoining plaintiff's to remain there, and from bringing more to endanger plaintiff's property.

It will be noticed that in every one of these cases the effect of the mandatory injunction was to restore things to their former condition.

An examination of the cases of Eisenburg *vs.* East India Co., etc., 10 Jurist, new series, 1021, and Mixborough *vs.* Bower, 7 Beaven, 127, and Wells, Fargo & Co. *vs.* O. R. & N. Co., 8 Sawyer, 600–618, and Sou. Ex. Co. *vs.* Memphis R. R. Co., 2 McCrary, 57, and
304 Ex. Co. *vs.* R. R. Co., 3 McCrary, 147, and Dinsmore *vs.* L. C. & L. R. R. Co., 2 Fed. Rep., 465, cited by intervenors' counsel, shows that they are all cases where the mandatory injunction restored things to the condition in which they were before the wrong complained of happened.

The master is therefore of the opinion that in a case where a party seeks a specific performance of a contract or remedy by injunction in the nature of a bill for the specific performance of a contract where the right has never been exercised, and when there has been no action on the part of the defendants to change the *status quo*, that a mandatory injunction *in limine* cannot be granted.

The only doubt I have as to the correctness of this position in this case is whether the rule is modified by reason of the Wabash, St. Louis & Pacific Railway Company being in the hands of the receivers of this court. The receivers' counsel seems to make this distinction in his brief when he says: "This is not strictly a case for injunction, but the same ends accomplished by mandatory injunction are had here by an order on the receivers." Citing High on Receivers, secs. 374 and 188.

The granting of a mandatory injunction is a matter resting in the sound, judicial discretion of the chancellor, and in the case of The Central Trust Co. of N. Y. *vs.* The Wabash, St. L. & P. R. R. Co., St. Louis Transfer R. R. intervenor, reported in 27 Fed. Reporter, p. 73, Judge Brewer says: "It is not gracious in a Federal court which has taken possession of property by its receivers to make that possession an obstacle to any proposed public improvement. We should, so far as lies within our power, extend every facility
305 to every proposed public improvement, simply aiming to preserve the rights which attach to the property while it is in our possession, and that is all." In this view his honor Judge Treat concurred.

Under the terms of the reference the master has endeavored to give the court full information on every point referred, and his legal conclusions in regard to the points made by the counsel for the receivers and the intervenors, but he does not understand that it is his province to suggest things which are entirely within the discretion of the chancellor having in charge the Wabash, St. Louis & Pacific Railway Company.

All of which is respectfully submitted.

GEO. H. SHIELDS,
Special Master pro hac vice.

St. Louis, July 24th, 1886.

306 In the United States Circuit Court, Eastern District of Missouri.

CENTRAL TRUST CO. OF N. Y. *vs.* WABASH, ST. L. & P. R'Y CO. } Consolidated Cause.

Intervening Petition St. L., K. C. & Col. R. R. Co. et al.

In respect to this petition I have reached these conclusions:

(1.) As the petitioner has not as yet constructed its road to the boundary line of Forest park, the point at which, if at all, the contract right to use the track of the Wabash commences, but has made its connection with the Wabash road at Forsyth junction, some two-thirds of a mile distant, any order at present for the use of the Wabash track would be premature. Perhaps the petitioner may never build to Forest park. Unless it does it will, as admitted, never have any semblance of claim upon the Wabash.

(2.) It is suggested that although petitioner has not built its road to Forest park, yet, as it has made a connection with the Wabash two-thirds of a mile west thereof, the court, having possession
307 of the Wabash, through its receivers, should make an order directing the receivers to permit, temporarily, the use not only of the track as to which a contract right is claimed, but also the two-thirds of a mile as to which no right is claimed. The suggestion does not commend itself to my judgment. It is not pretended that the Wabash fails in any respect to discharge its full

duty as a connecting carrier with the petitioner, or that it makes any charges above the statutory rates. If it can make more money by carrying in its own cars and with its own motive power than by permitting the trains of another road to run over its track, the duty which is owing to its creditors and stockholders forbids any order, not demandable as a right, but made *ex gratia*, diminishing its revenues for the pecuniary benefit of another corporation. Counsel urge that the public convenience is against any transfer of passengers at Forsyth junction. Be it so. The obligation to consult the public convenience rests with the same force on the petitioner as on the Wabash. Let the former, if it would pose as special champion of the public convenience, tender the use of its track to the Wabash, instead of making this demand of the latter. I see nothing at present but a contest between two railroad corporations for respective pecuniary advantages, and in such a contest the question of right determines.

(3.) Counsel for the receivers contend that until petitioner has built its road to the park line it is in no position to ask any judgment of the court as to its rights over the Wabash track, and therefore that all the court can now do is to dismiss the intervening petition. The courts, they say, determine no hypothetical questions, but only pass upon existing claims. Counsel are, I think,
308 mistaken. Petitioner is proceeding in apparent good faith to build a road from St. Louis westward. It has twenty miles completed and more in process of construction. It seeks an entrance to the St. Louis Union depot. It proposes to build from Forsyth junction two-thirds of a mile to the park line, and then run over the Wabash track to the Union depot. It claims the latter as a contract right. If such right does not exist it will have to seek entrance in another way, and the building of the two-thirds of a mile of track to the park line may be a useless expense. I think common justice requires that its rights of entrance over this route be determined before it is compelled to expend a large sum of money in perhaps a useless work. This is a *quasi* condemnation proceeding, and in this aspect its right of condemnation along the entire route may legitimately be determined before any expenditure in the way of actual construction.

(4.) This intervening petition is in the nature of an application for a mandatory injunction. Such an injunction seldom goes *in limine*, and never unless to preserve the *statu quo* or where the right is clear and the only controversy one of compensation, protection as to which can be fully secured by bond. Here the petitioner has never had the use of the Wabash track. It seeks by this proceeding not to maintain but to change the *statu quo*. Its rights have never been determined. They are disputed. They are doubtful. If there were no receivership, no order for enforcing this contract would be made until after bill, answer, and decree. This intervening petition takes the place of an ordinary bill, but there should be answer and full hearing upon the question of right before any order en-
309 forcing the contract is made. Neither party should gain or lose by the mere fact of a receivership. So far as possible,

the regular and orderly administration of justice should be preserved. No answer has been filed by the receivers or the Wabash. While, of course, the defenses of the Wabash have been suggested, yet an answer should be filed and a full hearing be had upon the question of right. I have given some examination to the question of right and will only say that I think it very doubtful. More than that it would, perhaps, be improper for me to say in advance. Whether any obligation rests upon the Wabash; whether that obligation, if one exists, extends beyond the one-half of the right of way of the St. Louis County R. R. not conveyed in the first instance to the St. L., K. C. and Northern R. R. Co.; whether it is an obligation as to use of track or merely that portion of the right of way not occupied by Wabash tracks are questions which certainly deserve careful consideration and should not be hastily determined *in limine* or upon any preliminary inquiry.

I endorse fully that which is so well and ably said by the master as to the impropriety of mandatory injunctions *in limine*, and I can but express my admiration of and thanks for his clear and discriminating report, prepared as it was in the brief time I allowed him.

The order, therefore, will be that the matter be referred to the same master; that the Wabash Co., the receivers, and the Central Trust Co. be ruled to answer within fifteen days; that either party be allowed to offer additional testimony, and that the master report on or before the 8th of September. Exceptions by either party can then be filed within five days and the final hearing had the first of the coming term.

D. J. BREWER,
Circuit Judge.

310 In the Circuit Court of the United States for the Eastern District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*, Defendants.	In Equity. Nos. 2357 and 2464. Consolidated Cause.

Order in Re Intervening Petition of St. Louis, Kansas City and Colorado Railroad Company et al.

JULY 30TH, 1886.

The report of the special master having been filed herein and the matters and things therein contained having been fully considered, it is ordered, adjudged, and decreed as follows, to wit:

That said matter be re-referred to George H. Shields, special master, for further report; that the Wabash, St. Louis and Pacific Railway Company, Thomas E. Tutt and Solon Humphreys, re-
311 ceivers, and the Central Trust Company of New York and James Cheney, trustees, file answers to complainants' petition within fifteen days; that either party be allowed to offer additional

testimony before the master, and that said master file his further and supplemental report herein on or before September 8th, 1886.

It is further ordered that exceptions to the master's supplemental report may be filed by either party herein within five days after the incoming of said report, and final hearing had the first of the coming September term.

312 *Amended Bill of Complaint of Intervenors, The City of St. Louis and The St. Louis, Kansas City & Colorado R. R. Co. Filed August* 4, 1886.

UNITED STATES OF AMERICA, }
Eastern District of Missouri. }

In the Circuit Court of the United States for Eastern District of Missouri.

CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants,
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*, Defendants.
} Consolidated Cause. In Equity.

To the honorable the judges of said court:

Your orators, The City of St. Louis, a municipal corporation duly authorized, organized, and acting under the laws of the State of Missouri and a citizen of said State of Missouri, and The St. Louis, Kansas City & Colorado Railroad Company, a corporation duly authorized, organized, and acting under the laws of the State of Kansas and a citizen of said State of Kansas, intervening herein, *and* by leave of court file this their amended bill herein and complain of the Wabash, St. Louis & Pacific Railway Company, a corporation duly authorized, organized, and acting under the laws of the State of Missouri and a citizen of said State of Missouri, in said eastern district, — say:

313 First. That on the — day of ——, 1884, by the order of this court, Solon Humphreys and Thomas E. Tutt were duly appointed receivers of the said Wabash, St. Louis & Pacific Railway Company, and that they are now such receivers and in charge of the property, affairs, and business of said company as officers of this court, subject to its direction; that said Wabash, St. Louis & Pacific Railway Company owns a right of way, with a standard-gauge track thereon, in the city of St. Louis, commencing at Eighteenth street, in said city, near Poplar street, at the Union depot, in said city, running west to the east line of Forest park, in said city; thence through said park to Union avenue, in said city; thence in a northeasterly direction to the town of Ferguson, in the county of St. Louis; thence in a northerly direction to the city of Moberly, in the county of Randolph, State of Missouri; thence west to Kansas City, and thence north to Ottumwa, Iowa; that prior to the 11th day of August,

1875, the St. Louis, Kansas City & Northern Railway Company was a corporation of the State of Missouri and then owned a line of railway in the city and county of St. Louis running to a point opposite the city of St. Charles, in St. Charles county, State of Missouri, passing through the town of Ferguson, in St. Louis county; thence in a direct line to the city of St. Louis, at or near Biddle street, on the levee of said city; that on said 11th day of August, 1875, said St. Louis, Kansas City & Northern Railway Company, being desirous of obtaining an entrance to the said Union depot, in said city of St. Louis, which depot was then and is now located at or near Eighteenth street and Poplar street, in said city, for the pur-
314 pose of reaching said Union depot at said point, determined to build a branch railway from said town of Ferguson, in said St. Louis county, extending in a southeasterly direction from said town of Ferguson to Union avenue, in the city of St. Louis; thence through said Forest park; thence to said Eighteenth street, in the city of St. Louis, at said Union depot.

2. Complainants further state that at said date—that is to say, August 11th, 1875—the body of land, consisting of about 1,300 acres, known as "Forest park," and which was then situated in the county of St. Louis and near the western limits of said city of St. Louis, was under the control and management of a board of commissioners, of which Andrew McKinley was president and Charles Bland Smith was secretary; that said board of commissioners were duly appointed and acting under an act of the Legislature of the State of Missouri approved March 25th, 1874, being an act entitled "An act to establish Forest park, in the county of St. Louis, to provide for the establishment and government thereof, and to provide for the issue of bonds by the county court of St. Louis county for the purposes of said park and for the purchase and condemnation of lands for the same."

That under and by virtue of the said act the said board of commissioners did duly establish said Forest park for the people of the county of St. Louis; that the said board, under the said act, had power to lay off, improve, adorn, and generally govern, manage, and control the use of said park and the avenues surrounding the same, together with other powers given and granted under and by said act.

3. That prior to the 11th day of August, 1875, the St. Louis
315 County Railway Company, a corporation duly authorized, organized, and acting under the laws of the State of Missouri, had duly located its line of railroad and had acquired a right of way forty feet wide for its road through said park, commencing at a point on the north side of said park, where Union avenue intersects said park, thence in a southeasterly direction through said park to the eastern line of the same, and from said eastern line to said Eighteenth street said St. Louis County Railroad Company was the owner of a large part of such right of way; that the said St. Louis, Kansas City and Northern Railway Company found it necessary, in order to complete and operate its said branch railway from said town of Ferguson to said Union depot, to obtain a

right of way from said board of commissioners through said park; that thereupon, on the 11th day of August, 1875, the said St. Louis, Kansas City and Northern Railway Company and the said St. Louis County Railroad Company entered into an agreement for the joint use of the right of way of said St. Louis County railway through said park and for the purchase of a strip 30 feet wide off the south part of its right of way up to the terminus of its road in the city of St. Louis, at Eighteenth street.

That by the terms of said agreement the said St. Louis County Railroad Company and the said St. Louis, Kansas City and Northern Railway Company were to own the right of way and the railway thereon from said point on north line of said park to a point on east line at east end of tunnel and cut next east of said east line of said park and enjoy the joint use thereof for the purposes of their respective roads. The said St. Louis, Kansas City and Northern Railway Company was to advance all sums necessary to complete
316 the construction of the railway between the said points, and the said St. Louis County Railroad Company was to pay to said St. Louis, Kansas City and Northern Railway Company one-half of any sum so advanced by it for the purpose last aforesaid; that by the said contract if the said St. Louis County Railroad Company failed to pay said one-half of said sum, beingthe sum of sixty-five thousand dollars, to said St. Louis, Kansas City and Northern Railway Company it could not enjoy the use of said railway between the said points; that the said St. Louis County Railroad Company did fail to pay the said one-half, as provided in and by said contract, and thereupon the said St. Louis, Kansas City and Northern Railway Company, under the said agreements and conveyances of even date with said agreements, held said right of way under and subject to the terms thereof, a duly certified copy of which agreement is herewith filed, marked Exhibit "A."

That after the execution of said agreement, to wit, on the 11th day of August, 1875, the board of Forest park commissioners and the said St. Louis County Railroad Company and said St. Louis, Kansas City and Northern Railway Company duly entered into a certain tripartite agreement of that date, duly recorded in the recorder's office of city of St. Louis September 5th, 1879, in Book 620, page 8, whereby the said board of Forest park commissioners granted and conveyed unto and licensed and permitted the said St. Louis, Kansas City and Northern Railway Company, its successors and assigns, to have, hold, use, and enjoy a right of way forty-two feet wide in, upon, and through said park in common with and to be held and enjoyed jointly with said St. Louis County Rail-
317 road Company and its assigns on the terms of the said contract between them, and which right of way was that right of way then and there established by said tripartite agreement as the sole and final right of way for said companies through said park, and under the terms and conditions that said St. Louis, Kansas City and Northern Railway Company, its successors and assigns, should permit other railroads to use its right of way in and through said park and up to the terminus of its road in the city of St. Louis upon

such terms and for such fair and equitable compensation to be paid to it therefor as might be agreed upon by said companies. A certified copy of said agreement is herewith filed, Exhibit "B."

Said St. Louis, Kansas City and Northern Railway Company in the year 1875, subsequent to the execution of said agreement, did construct said railroad from said Eighteenth street to said Union avenue and soon thereafter built its said road from said town of Ferguson and entered upon and operated the same from said town of Ferguson through said park to said Eighteenth street, the point where the said Union depot is located; that on the 24th day of December, 1878, the said St. Louis, Kansas City and Northern Railway Company purchased and became the owner by deed of all the remaining rights, franchises, property, and right of way formerly held or owned by said St. Louis County Railroad Company through said park and to said Eighteenth street, subject to the said agreements, and on the — day of ——, 1879, conveyed the same to said Wabash, St. Louis and Pacific Railway Company by articles of consolidation, duly entered into as authorized by law, and since said date the said latter company has used, enjoyed,
318 owned, and operated all the property formerly owned by said St. Louis, Kansas City and Northern Railway Company, including the said railroad and right of way from said Union avenue to Eighteenth street, and now in the exclusive possession and enjoyment thereof; that on the — day of ——, 1876, the limits of the said city of St. Louis were lawfully extended westwardly so as to include the whole of said Forest park, and said city duly became and is now the owner of the said park, with full power to control and manage the same. The said board of Forest park commissioners was in the year 1876, by law, abolished, and the said city then became, has ever since been, and is now the successor of said board of Forest park commissioners and the owners of said park and invested with all the rights reserved by the said board under the contract or otherwise heretofore made for or on behalf of said park by the said board; that the said City of St. Louis, one of the orators herein, is by law charged with the duty of protecting the said park and interested in preventing the said park from being cut up by lines of railway seeking entrance to said city and in limiting other railroads, including said St. Louis, Kansas City & Colorado Railroad Company, *and* to the use of said right of way through said park and to said Union depot and in enforcing the said tripartite agreement for the benefit of said St. Louis, Kansas City and Colorado Railroad Company and other railroads that may seek entrance through said park to said Union depot; that the said city is a large municipal corporation, having a population of about 500,000 inhabitants—is an important commercial center to which different lines of railway from year
319 to year are seeking entrance to its Union depot. The said Union depot is a point to which all railways entering said city converge; that to avoid the cutting up of said park and thereby destroy its beauty and attractiveness, as well as to afford facilities for other railways to enter the said Union depot, said

board of commissioners, in and by the said tripartite agreement of August 11th, 1875, imposed the condition that the said St. Louis, Kansas City & Northern Railway Company, its successors and assigns, should permit other railroads, under such reasonable regulations and terms as might be agreed upon, to use its said right of way through the said park and up to the terminus of its road in the city of St. Louis upon such terms and for such fair and equitable compensation to be paid as might be agreed upon by said companies.

That the said Wabash, St. Louis & Pacific Railway Company now holds and enjoys all of said right of way under the terms and conditions of the said agreements and deeds and not otherwise.

Your orators further say that the St. Louis, Kansas City & Colorado Railroad Company has completed its railway, being of standard gauge, from the city of St. Louis to Creve Cœur Lake, a distance of about twenty miles, and that the same is now ready for operation; that it is engaged in further constructing its road in the State of Kansas, as well as in the State of Missouri, with a view of operating the same from said State of Kansas into and through the State of Missouri to said city of St. Louis; that its railway which has been built from said Creve Cœur Lake to the city of St. Louis now forms a junction with the railway of said Wabash, St. Louis &
320 Pacific Railway Company at Forsyth junction, a point at or near the north line of said park, at said Union avenue, and desires to avail itself of the provisions of said tripartite agreement by using the right of way of said Wabash, St. Louis & Pacific Railway Company through said park and to the terminus of its road in said city of St. Louis, at Eighteenth street, at said Union depot; that said St. Louis, Kansas City & Colorado Railroad Company was duly incorporated as aforesaid on the — day of ——, 1884, and has constructed its railway as aforesaid since said date.

Your orators allege that by and under the terms of said tripartite agreement and the said deeds to said St. Louis, Kansas City & Northern Railway Company the said St. Louis, Kansas City & Colorado Railroad Company is now entitled to the use of said right of way of said Wabash, St. Louis & Pacific Railway Company through said park and up to the terminus of its road in the city of St. Louis, at said Eighteenth street, the said right of way being about four miles in length, by paying to it the fair and equitable compensation for such use; that the said St. Louis, Kansas City & Colorado Railroad Company has applied to said receivers, Solon Humphreys and Thomas E. Tutt, for the use of said right of way on the terms of said tripartite agreement and endeavored to agree with them upon the amount of money to be paid to them as a fair and just compensation for the use of said right of way; but said Wabash, St. Louis & Pacific Railway Company, through said receivers, refused absolutely and unqualifiedly to permit said St. Louis, Kansas City & Colorado Railroad Company to run its trains over said right of way upon any terms,
321 and deny that said company has the right to use said right of way as claimed. The said St. Louis, Kansas City &

Colorado Railroad Company have offered to pay them such fair and equitable compensation as may be just, and now offers to pay such fair and equitable compensation as this honorable court by its order and decree may require.

Your orators further state that by reason of the refusal of the said Wabash, St. Louis & Pacific Railway Company, through the said receivers, to permit the use of said right of way as aforesaid the interests of the city of St. Louis are suffering, and the said St. Louis, Kansas City & Colorado Railroad Company is prevented from operating its railway, and has thereby suffered and is now suffering irreparable damage and loss by reason of the refusal aforesaid.

Wherefore your orators pray that a writ of injunction issue out of and under the seal of this honorable court enjoining and restraining the said Wabash, St. Louis & Pacific Railway Company and the said Solon Humphreys and Thomas E. Tutt, as such receivers, and each of them, and of their agents, servants, counsellors, and employés, from in any manner refusing to permit your orator, The St. Louis, Kansas City & Colorado Railroad Company, under such reasonable regulations and terms as to this court may seem proper, from using the said right of way of said Wabash, St. Louis & Pacific Railway Company, commencing at the north line of said park, where the railway of said Wabash, St. Louis & Pacific Railway Company enters said park, thence over said right of way to said Eighteenth street, in said city of St. Louis, by running its engines and cars over and upon said right of way, including the tracks of said
322 Wabash, St. Louis & Pacific Railway Comyany between the points at said Union avenue and said Eighteenth street; that a temporary injunction pending the said hearing thereof against the said defendants, as herein prayed, be granted; that the said receivers, Solon Humphreys and Thomas E. Tutt, be ordered to permit said St. Louis, Kansas City & Colorado Railroad Company to use said right of way and tracks between said points last above named and on the terms aforesaid, and that your orators may have such further relief in the premises as is consistent with equity and good conscience and as to this honorable court may seem meet.

May it please your honor to grant unto your orators a writ of subpœna directed to the defendants, and thereby commanding them and each of them to be and appear before this honorable court, at some certain day to be fixed therein, and answer the premises and abide by and perform such order and decree as may be passed therein and as to your honor shall seem meet; and your orators, as in duty bound, will ever pray.

LEVERITT BELL,
Solicitor for City of St. Louis.
NOBLE & ORRICK,
Sol's for St. Louis, Kansas City & Colorado Railroad Company.

DYER, LEE & ELLIS, *Of Counsel.*

323 UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

John C. Orrick, one of the solicitors for the intervenors herein, duly sworn, says that the matters alleged and set forth in the above bill so far as they are stated upon knowledge are true, and so far as they are stated upon information and belief he believs them to be true.

JOHN C. ORRICK.

STATE OF MISSOURI, } ss:
City of St. Louis, }

Sworn to and subscribed before me this 31st day of July, A. D. 1886.

Witness my hand and official seal.

C. D. GREENE, JR.,
Notary Public.

LEAVENWORTH, *Aug. 3d*, 1886.

Let this amended intervening petition be filed with like turn to answer as given in prior order.

D. J. BREWER,
Circuit Judge.

324 *Answer. Filed Aug.* 21, 1886.

UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

In the Circuit Court of the United States for the Eastern District of Missouri.

CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants,
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*, Defendants.
} Consolidated Cause. In Equity.

Answer to the amended intervening petition of The City of St. Louis and The St. Louis, Kansas City and Colorado Railroad Company.

The Wabash, St. Louis & Pacific Railway Company, Thomas E. Tutt and Solon Humphreys, receivers, and the Central Trust Company of New York and James Cheney, trustees, as hereinafter stated, now and at all times saving and reserving unto themselves all and all manner of benefit of exception that may be had or taken
325 on account of the imperfections and errors in said amended bill of intervention contained, for answer thereto respectfully say:

It is true that said Thomas E. Tutt and Solon Humphreys are the receivers in charge of the property, affairs, and business of the Wabash, St. Louis & Pacific Railway Company, and that as such they are subject to the orders and directions of this court.

That it is true, as averred in said bill, that said Wabash, St. Louis & Pacific Railway Company owns a right of way, with a standard-gauge track thereon, in the city of St. Louis, commencing at Eighteenth street, in said city, and running west to the east line of Forest park, in said city; thence through said park to Union avenue, and from thence in a northwesterly direction to Ferguson, in the county of St. Louis; Moberly and Kansas City, in the State of Missouri, and Ottumwa, in the State of Iowa.

That it is true that prior to the 11th day of August, 1875, the St. Louis, Kansas City & Northern Railway Company was a railroad corporation of the State of Missouri, and that it then owned a line of railway extending from a point opposite the city of St. Charles, through the said town of Ferguson, to a point at or near Biddle street on the levee, in the city of St. Louis, and that on said 11th day of August, 1875, said St. Louis, Kansas City & Northern Railway Company was desirous of obtaining an entrance to the Union depot in said city, and that for the purpose of reaching said depot it determined to build a branch railway from the said town of Ferguson, in a southeasterly direction, to Union avenue, in said city, and from thence through said Forest park to Eighteenth street.

326 They admit that on or about said 11th day of August, 1875, there was a body of land consisting of about thirteen hundred acres, known as "Forest park," all of which was then situated in the county of St. Louis, near the western limits of said city, and which was for certain purposes under the control and management of a board of commissioners, of which Andrew McKinley was president and Charles Bland Smith was secretary, and defendants believe said board was duly appointed under an act of the Legislature of the State of Missouri approved March 25, 1874, being an act entitled "An act to establish Forest park, in the county of St. Louis; to provide for the establishment and government thereof, and to provide for the issue of bonds by the county court of St. Louis county for the purposes of said park and for the purchase and condemnation of lands for the same."

They believe it is true that said park had on the date last aforesaid been duly established, and that said board had under said act the power to lay off, improve, adorn, and generally govern, manage, and control the use of said park and the avenues surrounding the same.

Defendants admit that prior to the 11th day of August, 1875, the St. Louis County Railroad Company was a corporation duly organized under the laws of the State of Missouri and had duly located its line of railroad and acquired a right of way forty feet wide for its road through said park, commencing at a point on the north side thereof where Union avenue intersects said park, and extending from thence in a southeasterly direction, through said park, to the eastern line of the same.

327 Defendants say it is not true and they deny that said St. Louis County Railroad Company was, on said 11th day of August, 1875, the owner of the larger part of right of way for its railroad extending from the eastern line of said Forest park in a south-

easterly direction to Eighteenth street, in the city of St. Louis, or to the Union depot in said city; but defendants admit that said county railroad company was, on the date last aforesaid, the owner of a right of way through a number of lots and tracts of land situated between said park and said Union depot.

Defendants admit that on the 11th day of August, 1875, the said St. Louis, Kansas City and Northern Railway Company and the said St. Louis County Railroad Company entered into an agreement for the joint use of the right of way of said St. Louis County Railroad Company through said park, and for a sale by said St. Louis County Railroad Company to said St. Louis, Kansas City and Northern Railway Company of a strip twenty-eight or thirty feet in width off the south part of all the lots and tracts of land then owned by it between said park and said Eighteenth street.

Defendants admit that by the terms of said agreement the St. Louis County Railroad Company and the St. Louis, Kansas City and Northern Railway Company were to have the joint use of said right of way through said park and up to the end of the tunnel and cut next east of the east line of said park on the terms and conditions and for a period of time therein set forth, and that by the terms of said contract said St. Louis, Kansas City and Northern Railway Company was to advance all sums of money necessary to complete the construction of the railway between said points, and that the St. Louis County Railroad Company was to repay
328 to said St. Louis, Kansas City and Northern Railway Company one-half of all sums so advanced for the purposes last aforesaid.

Defendants admit that it was provided in said contract that if said St. Louis County Railroad Company failed to pay to said St. Louis, Kansas City and Northern Railway Company one-half the sum so advanced, the St. Louis County Railroad Company should not enjoy the use of said railway between said points.

Defendants admit that said St. Louis County Railroad Company failed to pay one-half of said sum, as provided in said agreement, and that said St. Louis, Kansas City and Northern Railway Company has ever since held said right of way through said park, tunnel, and cut for its sole and exclusive use, free of all claims, rights, or interest of said St. Louis County Railroad Company.

Defendants admit that a true copy of said agreement is filed with the petition herein, marked "Exhibit A."

Defendants admit that after the execution of said agreement between said St. Louis County Railroad Company and said St. Louis, Kansas City and Northern Railway Company, to wit, on the 11th day of August, 1875, the board of Forest park commissioners, the St. Louis County Railroad Company, and said St. Louis, Kansas City and Northern Railway Company entered into a certain tripartite agreement, whereby said board of commissioners assumed and pretended to grant, convey, license, and permit the said St. Louis, Kansas City and Northern Railroad Company, its successors and assigns, to have, hold, use, and enjoy the said right of way, forty feet wide, heretofore owned by said St. Louis County Railroad Com-

pany, and two feet in addition in, upon, and through said
329 park, in common with and to be held and enjoyed jointly with said St. Louis County Railroad Company and its assigns upon the terms set forth in the aforesaid contract between said railroad companies.

Defendants admit that a true copy of said tripartite contract is filed with the petition herein, marked Exhibit "B."

Defendants say it is not true and they deny that said pretended grant was made upon condition that said St. Louis, Kansas City and Northern Railway Company, its successors or assigns, would permit other railroads to use its right of way in or through said park and up to the terminus of its road in said city of St. Louis upon such terms or for such fair and equitable compensation to be paid therefor as might be agreed upon by said companies or on any terms whatever.

Defendants admit that said St. Louis, Kansas City and Northern Railway Company, in or about the year 1875, constructed its said railroad from said Eighteenth street to said Union avenue and to said town of Ferguson, and that it entered upon and operated the same from said Ferguson through said park to said Eighteenth street and the Union depot aforesaid.

Defendants deny that on the 24th day of December, 1878, or at any other time, the said St. Louis, Kansas City and Northern Railway Company purchased or became the owner, by deeds or otherwise, of all the remaining rights, franchises, property, and rights of way formerly held or owned by said St. Louis County Railroad Company through said park and to said Eighteenth street, subject to the agreements aforesaid or subject to any contract or agree-
330 ment whatsoever with said park commissioners or said St. Louis County Railroad Company; but they admit that on or about the — day of ——, 1879, said St. Louis, Kansas City and Northern Railway Company was consolidated with the Wabash Railway Company under the name of the Wabash, St. Louis and Pacific Railway Company, and that since said date the company last aforesaid and the defendants herein have used, enjoyed, and operated all the property formerly owned by said St. Louis, Kansas City and Northern Railway Company, including said railroad and right of way from said Union avenue to Eighteenth street, and that they are now in the exclusive possession and enjoyment thereof.

That as to whether, on or about the — day of ——, 1876, the limits of the city of St. Louis were lawfully or otherwise extended westwardly, so as to include the whole or any part of said Forest park, or as to whether said city is now the owner of said park, with power to control or manage the same, or as to whether said board of park commissioners was, in the year 1876 or at any other time, abolished, or as to whether said city has become the successor of said board of park commissioners or the owner of said park or invested with all or any of the rights reserved by said board under said contract with the aforesaid parties, or as to whether said city is by law charged with the duty of protecting said park or interested in preventing the same from being cut up by lines of railway seek-

ing entrance to said city or in limiting other railroads, including said St. Louis, Kansas City and Colorado Railroad Company, to the use of any particular right of way through said park or to said
331 Union depot or in enforcing any of the provisions of the agreements aforesaid, defendants have no knowledge or information save as they are informed by said petition.

Defendants admit that the said city of St. Louis is a large municipal corporation, and that said Union depot is a point to which all railways entering said city converge; but defendants say it is not true and they deny that to avoid the cutting up of said park or destroying its beauty or attractiveness or that in order to afford facilities to other railways to enter said Union depot the said board of commissioners, in or by said tripartite agreement, imposed or attempted to impose as a condition that said St. Louis, Kansas City & Northern Railway Company or its successors or assigns should permit other railroads to use its said right of way through the park and up to the terminus of its said road in the city of St. Louis upon such regulations or terms or for such fair or equitable compensation as might be agreed upon by said companies.

Defendants deny that they or said Wabash, St. Louis & Pacific Railway Company now hold or enjoy all or any portion of said right of way between said Union avenue and said Union depot under any agreement with any person or party whomsoever requiring them to permit other railroads or railroad companies to use the same; but defendants aver that they now hold and enjoy the right of way through said Forest park by and through grants from one W. D. Griswold and the State of Missouri to said St. Louis County railroad, free and unincumbered with any condition, easement or license from any source whatever, and they deny that, except as hereinafter stated, they hold said right of way or any part thereof under the agreements and deeds aforesaid.

332 That as to whether the said St. Louis, Kansas City & Colorado Railroad Company has completed its line of railroad from the city of St. Louis to Creve Cœur Lake, a distance of twenty miles, or as to whether the same is now ready for operation, or as to whether said company is engaged in constructing its road in the State of Kansas or in the State of Missouri with a view of operating the same from said State of Kansas into or through the State of Missouri to said city of St. Louis, defendants have no knowledge or information save as they are informed by said petition.

Defendants admit that the railway of said St. Louis, Kansas City & Colorado Railroad Company forms a junction with the railway of said Wabash, St. Louis & Pacific Railway Company at a point known as "Forsyth junction," in the city of St. Louis, but as to whether said St. Louis, Kansas City & Colorado Railroad Company was duly incorporated in 1884 or as to whether the same has ever been duly incorporated defendants are not informed.

Defendants say it is not true and they deny that by the terms of said tripartite agreement or of any deed to said St. Louis, Kansas City & Northern Railway Company the said St. Louis, Kansas City & Colorado Railroad Company is now entitled to the use of said

right of way of said Wabash, St. Louis & Pacific Railway Company through said park or up to the terminus of its said road in the city of St. Louis, at said Eighteenth street, but they admit that they have refused and that they still refuse to permit said St. Louis, Kansas City & Colorado Railroad Company to run its trains over its right of way, and that they have denied and now deny that
333 said company has the right to run its trains over said right of way.

Defendants deny that by reason of their refusal to permit the said St. Louis, Kansas City and Colorado Railroad Company to run its trains over said right of way the interests of said city of St. Louis have suffered or are suffering, or that said St. Louis, Kansas City and Colorado Railroad Company is prevented from operating its railway, or that it has suffered or is now suffering irreparable damage or loss or any damage or loss by reason of any act of the defendants; but, on the contrary thereof, defendants state that the railroad of said St. Louis, Kansas City and Colorado Company commences at said Forsythe junction, in said city of St. Louis, and extends, as defendants are informed, a distance of some ten or fifteen miles in the direction of Creve Cœur Lake, in the county of St. Louis; and these defendants say that they have been at all times ready and willing and that they are now ready and willing to receive and deliver passengers and freight to said St. Louis, Kansas City and Colorado Railroad Company at said Forsyth junction, and transport the same to any and all points of destination upon the lines of said Wabash, St. Louis and Pacific Railway Company upon fair and equitable terms and for a compensation within the limits fixed by law for such service.

Further answering said petition, defendants state the truth to be that prior to the passage of any law for the establishment of said Forest park, to wit, on or about the 1st day of November, 1871, the said St. Louis County Railroad Company was a corporation duly organized under the laws of the State of Missouri for the pur-
334 pose of constructing and operating a railroad from the city of St. Louis in a westerly direction to some point on Creve Cœur Lake, in the county of St. Louis, and that W. D. Griswold was, on the date aforesaid, the owner of a tract of land in the county of St. Louis embracing all that portion of Forest park upon and through which the defendants' railroad was afterwards constructed and upon and through which the same is now maintained and operated.

That, being the owner of said land, said Griswold afterwards, on or about the 3rd day of November, 1871, granted to said St. Louis County Railroad Company, its successors and assigns, a right of way forty feet in width through said tract for the location, construction, and maintenance of its railroad.

That in the deed of said Griswold conveying said right of way to said St. Louis County Railroad Company it was and is provided that if in the building said railroad it should be found that the forty feet aforesaid would not be sufficient for the completion thereof in a satisfactory manner, then the toe of the embankment might run over

onto the adjoining lands, and that said company might also extend the slope of the cuts as far beyond the limits of said forty feet as might be necessary or convenient.

Defendants state that afterwards, to wit, on or about the 25th day of March, 1874, an act of the General Assembly of the State of Missouri was duly passed and approved, entitled "An act to establish Forest park, in the county of St. Louis; to provide for the establishment and the government thereof, and to provide for the issue
335 of bonds by the county court of St. Louis county for the purposes of said park and for the purchase and condemnation of lands for the same."

That in and by the third section of said act it was and is provided: "That nothing in said act contained should prevent the St. Louis County Railroad Company from using and occupying a right of way of the width of not more than seventy feet through the northeastern portion of said Forest park; that said railroad should only enter the park through Duncan's subdivision, on the east side of said park, and run westwardly on the northern side of the River des Peres, and pass out of said park at a point on the northern line thereof east of Union avenue; that no switch or siding should be constructed by said railroad company in said park, nor more than one depot established therein, which should be for passengers only: And provided further, that the grade of said railroad, so far as the same runs through Forest park, should be approved by the park commissioners."

That afterwards, on or about the 11th day of August, 1875, the line of railroad of said St. Louis, Kansas City and Northern Railway Company being continuous and connected with the line of railroad of said St. Louis County Railroad Company from a point west of said park, in the county of St. Louis, to Tayon avenue, in the city of St. Louis, said companies entered into the contract filed with the petition herein, marked Exhibit "A."

That in and by said contract it was and is provided—

1st. That said county railroad company would, for the sum of $125,000, convey to said St. Louis, Kansas City and Northern Railway Company, by a deed of general warranty, a strip or lot
336 twenty-eight feet in width through all tracts and lots then owned by it between the junction of their said railroads and the north line of said park.

2d. That it would convey by like deed a lot twenty-eight feet in width through each tract of land then owned by it between the eastern line of the park and the then western limits of the city.

3d. That it would convey by like deed a lot thirty feet in width through each tract then owned by it between the then western limits of the city and said Tayon avenue.

4th. That it would convey by like deed an undivided one-half interest in and to its said right of way and in and to all other rights, privileges, franchises, powers, and immunities owned by or vested in or enjoyed by or that might thereafter be acquired and owned by, vested in, or enjoyed by it in, through, or upon Forest park by any means or from any source whatever.

5th. It was agreed that the use and enjoyment of the rights, privileges, and franchises, powers, immunities, improvements, and property in, through, and upon a proposed tunnel and cut adjoining the eastern line of Forest park and under Barnes avenue and to the east end of said cut should be in common by the parties thereto, their successors and assigns.

6th. It was agreed that at Compton avenue, in the city of St. Louis, and also for a limited distance west of Tayon avenue, the county railroad company should, under certain circumstances, have a right to lay one of the rails of its railroad track on the
337 thirty-foot strip to be conveyed by it to the St. Louis, Kansas City and Northern Railway Company.

7th. It was agreed that the St. Louis, Kansas City & Northern Railway Company should advance all funds necessary to construct and maintain the railroad bed and road in, upon, and through said Forest park and said tunnel and cut for the joint use of both said parties, their successors and assigns, and that said county railroad company should, within two years from the date of said contract, pay to said St. Louis, Kansas City & Northern Railway Company one-half the cost thereof; but in case said county railroad company should fail to make such payment, then all the rights, privileges, franchises, powers, immunities, improvements, and property of said county railroad company in, through, or upon said Forest park and in, through, over, and upon said tunnel and cut should, by virtue and force of such failure and refusal, without further process or proceedings, become forfeited and belong to said St. Louis, Kansas City and Northern Railway Company, its successors and assigns, and said last-named company was, in case of such failure, authorized to enter upon the sole and absolute possession and enjoyment of all said rights, privileges, franchises, powers, immunities, improvements, and property to the exclusion of said county railroad company, its successors and assigns.

8th. It was further agreed that in case said county railroad company should fail to make or elect not to make such payments within the time aforesaid, then said company would execute and deliver to said St. Louis, Kansas City and Northern Railway Company a good and sufficient deed granting and conveying to
338 it, its successors and assigns, all the right, title, and interest, in law or equity, which said county railroad company had or might have in and to said railroad and property in said park, tunnel, and cut, clear of all incumbrances.

Defendants further state that after the execution of the contract last aforesaid the said St. Louis, Kansas City and Northern Railway Company entered into a certain other agreement with said county railroad company and the commissioners of said Forest park, a copy whereof is filed with the petition herein, marked "Exhibit B;" but defendants deny that said agreement was duly recorded.

That by said agreement the width of the right of way of said county railroad company through said park was fixed at forty-two feet; but defendants say that said county railroad company was already the owner of a right of way forty feet in width through

said park under its aforesaid deed from Griswold, and that by the third section of said act of March 25th, 1874, establishing said park, said commissioners had no power to prevent said St. Louis County Railroad Company from occupying or making any other lawful use or disposition of its said right of way, previously acquired as aforesaid; and defendants say that neither the St. Louis County Railroad Company nor the St. Louis, Kansas City and Northern Railway Company nor the Wabash, St. Louis and Pacific Railway Company nor said Humphreys and Tutt, as receivers, nor either of the other defendants herein have ever, in any manner, occupied or used a right of way in or through said park of greater width than is mentioned and conveyed in said deed from Griswold to said St. Louis County Railroad Company.

339 That prior to the making of said tripartite contract said St. Louis County Railroad Company had conveyed or agreed to convey to the St. Louis, Kansas City and Northern Railway Company a portion of its said right of way through said park, as well as through all the lots and blocks then owned by it outside thereof; but that nevertheless said St. Louis County Railroad Company retained for the use of its own railroad a portion of all said lots and blocks, and, being by its charter authorized to construct and operate a railroad through said park, and from thence to Tayon avenue, in said city, it did, as the party of the second part in said tripartite agreement, personally and only for itself, agree with said park commissioners as follows, to wit:

"Ninth. Said party of the second part (the St. Louis County Railroad Company) shall permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park and up to the terminus of its road in the city of St. Louis upon such terms and for such fair and equitable compensation to be paid to it therefor as may be agreed upon by such companies."

Defendants state that the covenant aforesaid was not made by or for the St. Louis, Kansas City and Northern Railway Company; that it was a personal covenant and only related to such right of way as was retained and reserved by said county railroad company for use in the construction and operation of its own railroad; that said covenant was not attached to any grant made by said county railroad company; that it did not bind the grantees or assignees of said company or any real estate or right of way conveyed or

340 to be conveyed by said county railroad company to the St. Louis, Kansas City and Northern Railway Company; and defendants are also informed and believe that said covenant on the part of said St. Louis County Railroad Company with said commissioners to permit other railroad companies to use its said right of way through said park and up to the terminus of its road in St. Louis was void for the reason that there was no consideration for the same, and because said park commissioners had no power under said act to grant or give said railroad companies anything as a consideration for said covenants.

Defendants further state that by said tripartite contract the grade

of said railroad was approved by said park commissioners, and the manner in which the slopes and sides of said road were to be made and kept through said park was agreed upon, and by the 12th clause or section thereof it was provided that said railroad companies should enter upon and enjoy the right of way and all the rights, privileges, immunities, powers, improvements, and property belonging to or vested in or that might belong to or vest in the party of the second part (the St. Louis County Railroad Company) in, upon, and through said park in common on the terms stated in said contract previously entered into between said companies.

And it was also provided in said tripartite agreement that in case said St. Louis County Railroad Company should forfeit its said rights, privileges, and franchises in, upon, and through said park by failing to pay one-half the cost of said improvements, as provided in the agreement previously entered into by said railroad companies, then said St. Louis, Kansas City and North-
341 ern Railway Company was not to be excluded from said park, but said company, its successors and assigns, was to continue to have and enjoy all said rights, privileges, immunities, franchises, improvements, and property in and through said park, upon the terms in said contract set forth, continuously and forever; and defendants say that "the terms in said tripartite contract set forth" were therein defined to be "the terms" contained in the contract previously entered into between said railway companies, with only the additional undertaking on the part of said St. Louis, Kansas City and Northern Railway Company to the effect that it would assume and perform all the covenants of said county railroad company with said park commissioners with respect to the making of improvements in said park, excepting as to the building of a depot and switch therein, which were to be made by said county railroad company, the true intent and meaning of said twelfth clause or section of said tripartite contract being that in case said county railroad company should forfeit its rights in and through said park, then the St. Louis, Kansas City and Northern Railway Company was not to be excluded therefrom, but was to continue to occupy the same under the terms of the contract previously made between said railroad companies, and not under the terms of said tripartite contract, except in so far as said St. Louis, Kansas City and Northern Railway Company assumed the covenants of said county railroad company therein contained with respect to the making of certain improvements in said park.

And defendants further say that the only rights, privi-
342 leges, immunities, powers, improvements, and property which said St. Louis, Kansas City and Northern Railway Company was, in case of forfeiture, to have, hold, and enjoy subject to the terms of either of said contracts were such as were within said park and such as were to be entered upon and occupied by said companies in common, and that in no event was anything outside said park included or intended to be included in said tripartite agreement.

Defendants state that afterwards, to wit, on or about the 11th day

of August, 1875, said St. Louis County Railroad Company, in pursuance of the agreement first aforesaid (the one between said railroad companies), for said consideration of $125,000, conveyed to said St. Louis, Kansas City and Northern Railway Company by deed of general warranty—

1st. A strip of land twenty-eight feet in width off the south side of its said right of way through the park and a strip twenty-eight feet in width off the south side of all the other tracts and lots of land then owned by it between the eastern line of the park and the then western limits of the city.

2d. A strip thirty feet in width off the south side of each tract or lot then owned by it between said western limits of the city and Tayon avenue.

3d. An undivided one-half interest in and to said right of way, as well as in and to all other rights, privileges, franchises, powers, and immunities owned by or that might thereafter be acquired or owned by it in, through, or upon Forest park by any means or from any source whatever.

That by the terms of said deed the conveyance of said tracts
343 of land and rights of way was made subject to the terms and conditions upon which the same had been granted to said St. Louis County Railroad Company.

Defendants say that none of said lots or tracts of land outside said park had been granted to said St. Louis County Railroad Company on condition that it should permit other railroad companies to use the same, and that no such condition was or is contained in the deed made by said Griswold to said county railroad company in 1871 for a right of way through said tract then owned by him, but now contained within the limits of said park.

That immediately after said county railroad company had conveyed to said St. Louis, Kansas City & Northern Railway Company a strip 28 or 30 feet in width, as aforesaid, off the south side of all tracts and lots of land then owned by it between the north line of said park and Tayon avenue, in the city of St. Louis, the said St. Louis, Kansas City & Northern Railway Company proceeded to acquire from the then owners thereof, at its own expense, by purchase or condemnation, a right of way through all the remaining and intermediate lots in such manner as gave said company a continuous right of way sufficient for the construction and operation of its railroad from said north line of said park to Tayon avenue, in said city; and said company afterwards, in the years 1875 and 1876, constructed its railroad thereon, paying out, as defendants are informed and believe, in the construction of said line and in the purchase and condemnation of said additional right of way and as damages to real estate and property not taken a sum in excess of one million dollars.

344 That said St. Louis County Railroad Company wholly failed to pay on demand to said St. Louis, Kansas City & Northern Railway Company any part of the cost of said railroad in and through said park, and elected not to pay the same, and that thereupon, at the expiration of two years from the date of said con-

tract, said St. Louis, Kansas City & Northern Railway Company, in accordance with the terms of the agreement aforesaid, entered upon the sole and absolute possession and enjoyment of all said rights, privileges, franchises, powers, immunities, improvements, and property, to the exclusion of said St. Louis County Railroad Company, its successors and assigns.

That afterwards, on or about the 10th day of November, 1879, said St. Louis, Kansas City & Northern Railway Company was, as alleged in the petition, consolidated with the Wabash Railway Company, under the name of the Wabash, St. Louis & Pacific Railway Company, and thereupon said consolidated company became, by force of the statute in such cases made and provided, seized and possessed of all the aforesaid real estate, railroads, and property previously owned or possessed by said St. Louis, Kansas City & Northern Railway Company.

That afterwards, on or about the 1st day of June, 1880, said Wabash, St. Louis & Pacific Railway Company issued eighteen thousand bonds, negotiable for the sum of $1,000 each, due forty years after date, with interest at the rate of 6 per cent. per annum, payable semi-annually on the first days of June and December in each year, and to secure the payment thereof said Wabash, St. Louis & Pacific Railway Company, on or about the date last aforesaid, conveyed to defendants, The Central Trust Company of New York and James Cheney, trustees, all its railroads, real estate, and rights of way of every kind, wheresoever situated, including the railroad, real estate, and right of way through said park and from the east line thereof to the Union depot, at Tayon avenue, in the city of St. Louis.

345

That it was and is provided in the mortgage or deed of trust aforesaid that if said company should make default in payment of the principal or interest of said bonds and such default should continue for a period of six months, then said trustees might, by themselves or by their superintendents or receivers, take possession of and manage and control said railroad and property and collect all the rents, tolls, incomes, and profits thereof, and after paying the operating expenses of said railroads and the taxes on said property apply the balance to the payment of the principal and interest due on said bonds.

That said company made default in payment of the interest due June 1st, 1884, on the bonds aforesaid; that said default still continues, and that all interest accruing on said bonds since said date is now due and unpaid.

That in or about the month of May, 1884, said Wabash, St. Louis and Pacific Railway Company became insolvent and filed its bill herein, asking your honors to appoint receivers of all its said property, and that thereupon defendants, Solon Humphreys and Thomas E. Tutt, were, by an order or decree entered herein, duly appointed receivers of all the railroads and property of said company, and in pursuance thereof they took possession of all the railroads and property aforesaid.

That said receivers are now in possession of said property
346 under said mortgage and for the benefit of the holders of said eighteen thousand bonds and the other creditors of said company, and defendants say that neither said bondholders, trustees, nor receivers are privy to or bound by any agreement or contract made by said St. Louis County Railroad Company with said park commissioners with respect to the use of its right of way through said park or elsewhere by other railroads.

That as to the real estate and right of way in and through said park conveyed as aforesaid by said county railroad company to the St. Louis, Kansas City & Northern Railway Company there is neither privity of contract nor privity of estate between the petitioners herein and the defendants herein or either of them.

2nd. That as to the real estate and right of way lying between the eastern line of said park and Tayon avenue conveyed by the county railroad company to said St. Louis, Kansas City and Northern Railway Company as aforesaid there is neither privity of estate nor privity of contract between the petitioners herein and the defendants herein or any of them.

3d. That as to the right of way and real estate outside said park subsequently acquired by said St. Louis, Kansas City & Northern Railway Company by purchase and condemnation as aforesaid there is neither privity of estate nor privity of contract between the petitioners herein and the defendants herein or any of them.

Wherefore, in consideration of the premises, defendants say said contract of said St. Louis County Railroad Company with said park commissioners concerning the use of its right of way by other railroads ought not to be enforced in equity against the defendants herein or any of them.

347 And defendants further say that as to said ninth clause of said tripartite agreement, on which petitioners rely for the enforcement of the rights claimed by them—if the same shall be adjudged to have been obligatory and binding on said St. Louis County Railroad Company—there is nothing therein contained which entitled petitioners to have any relief in equity against the defendants herein or any of them—

1st. Because the ninth clause of said contract only required the St. Louis County Railroad Company to permit other railroads to use its said right of way on such terms as might be agreed upon between it and other railroads desiring the use thereof, and it would be inequitable for your honors to substitute the judgment of the court for the judgment of any party bound by said agreement.

2d. Because there was never any mutuality of obligation between said St. Louis County Railroad Company and other railroad companies desiring to use its said right of way.

Wherefore defendants say the petitioners herein ought not to have any relief in equity, and especially that no writ of injunction ought to issue out of or under the seal of this honorable court, as prayed for, restraining the defendants or any of them or their agents or servants from refusing to permit said petitioner, The St. Louis, Kansas City & Colorado Railroad Company, from using said right of

way through the park and from thence to said Union depot, at Eighteenth street; and that no order ought to be made herein directing defendants or any of them to permit said St. Louis, Kansas City & Colorado Railroad Company to use said right of way or
348 tracks on the terms prayed for or any terms whatever.

WELLS H. BLODGETT,
Solicitor for Defendants.

WARWICK HOUGH &
H. S. PRIEST,
Of Counsel.

UNITED STATES OF AMERICA,
Eastern District of Missouri, } ss:

Wells H. Blodgett, solicitor for defendant herein, being duly sworn, says that the several matters and things set forth in the above answer, in so far as the same are stated on knowledge, are true, and in so far as stated on information and belief he believes them to be true.

WELLS H. BLODGETT.

Subscribed and sworn to before me this 21st day of August, 1886.
GEORGE M. BLOCK,
Notary Public.

349 *Replication. Filed Sept.* 1, 1886.

UNITED STATES OF AMERICA,
Eastern District of Missouri, } ss:

In the Circuit Court of the United States for the Eastern District of Missouri.

CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants,
vs.
WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*, Defendants.
} Consolidated Cause. In Equity.

The replication of The City of St. Louis and The St. Louis, Kansas City & Colorado Railroad Company, complainants and intervenors, to the answer of The Wabash, St. Louis & Pacific Railway Company, Thos. E. Tutt, Solon Humphreys, receivers, and The Central Trust Company of New York and James Cheney, trustees, defendants.

350 These repliants, saving and reserving unto themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver, maintain, and prove their said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that

the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by *this* repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby sufficiently replied unto, confessed or avoided, traversed or denied, is true; all of which matters and things these repliants are and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in their said bill they have already prayed.

LEVERETT BELL,
Solicitor for City of St. Louis.
NOBLE & ORRICK,
Solicitors for St. Louis, Kansas City & Colorado Railroad Company.
DYER, LEE & ELLIS, *Of Counsel.*

351 In the Circuit Court of the United States for the Eastern District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* THE WABASH, ST. LOUIS & PACIFIC Railway Company *et al.*, Defendants; St. Louis, Kansas City & Colorado Railroad Company *et al.*, Intervenors.	In Chancery. No. 2357. No. 2464. (Consolidated.) Master's No., 279; clerk's No., —.

Record of Proceedings before the Master.

This case having been re-referred to the master in chancery with instructions on the 30th day of July, 1886, was set for hearing, at the United States circuit court room, in the Custom-House
352 building, in the city of St. Louis, State of Missouri, on the 30th day of August, at 10 a. m., and notices thereof were given to Messrs. Green, Burnett & Humphrey, solicitors for the Wabash, St. Louis & Pacific Railway Company; Messrs. Phillips & Stewart, solicitors for the Central Trust Company of New York and James Cheney, trustees; Messrs. Dyer, Lee & Ellis and Messrs. Noble & Orrick, solicitors for The St. Louis, Kansas City & Colorado Railroad Company, intervenor, and Leverett Bell, Esq., solicitor for The City of St. Louis, intervenor, and Wells H. Blodgett, Esq., solicitor for the receivers. A notice was sent to the office of H. T. Kent, Esq., solicitor for the Wabash, St. Louis & Pacific Railway Company, but he was not found in the city.

On August 4th, 1886, the intervenors filed an amended petition. On the 21st day of August, 1886, the defendants in the suit, by their solicitor, Wells H. Blodgett, Esq., filed an answer in the case, and on the 1st day of September, 1886, the intervenors filed a general replication.

On August 30th, 1886, at 10 a. m., the master was at the appointed place, but, owing to stipulation between counsel for the intervenors

and counsel for the defendants, the case was continued until the 7th day of September, 1886; and afterwards, upon being notified that the parties were ready to take the case up on the 2nd day of September, the continuance to the 7th was set aside and the case set for hearing at 2 p. m. September 2nd, 1886.

On September 2nd, 1886, the case coming on to be heard, there were present the master, John C. Orrick, Esq., representing the intervenors, and H. S. Priest, Esq., representing the defendants.

353 It being questionable, owing to the change of the time of the hearing of the case by stipulation, whether the report of the master can be filed in accordance with the order of court on the 8th of September, it is understood by the parties that the master is to file his report as soon as possible, and that exceptions by either party are to be filed within three days after notice of the preparation of the report by the master, so that the matter can be disposed of during the early days of the coming term, while Judge Brewer is on the bench.

Counsel for the intervenors offers in evidence a certified copy of the charter of the St. Louis, Kansas City & Colorado Railroad Company, and in connection with it the statutes of Kansas in reference to the incorporation of railroad companies.

Counsel for the intervenors offers in evidence a copy of an agreement made on the 9th day of October, 1872, between the Forest park commissioners and the St. Louis County Railroad Company.

Counsel for the defendants objects to the same as not being sufficiently authenticated, either as to its certificate of accuracy or execution, to allow its introduction as a copy, and also as not being recorded and no knowledge being shown in the St. Louis, Kansas City & Northern Railway Company at the time of acquiring the property from the St. Louis County Railroad Company.

Counsel for intervenors states that he does not know whether he can show actual knowledge on the part of the St. Louis, Kansas City and Northern Railway Company of the agreement, and the master receives the paper subject to objection, to be passed on hereafter.

354 Counsel for the defendants admits that the whole of Forest park is in the city limits of the city of St. Louis, and is administered, and has been since about 1876, by the park commissioners as a part of the city government.

At this point the further hearing of the matter was adjourned until 2 p. m., September 3, 1886.

Pursuant to adjournment, as above stated, on September 3, 1886, the intervenors appeared, by J. C. Orrick, Esq., and the defendants by H. S. Priest, Esq., and the hearing of the matter was resumed.

JAMES W. PARAMORE, being duly sworn on the part of the intervenors, testifies as follows:

Direct examination by Mr. ORRICK:

Q. What has been your business for several years past?

A. Well, it has been railroading for about seven years or for the most of ten years.

Q. With what road were you connected, and in what capacity?

A. I was connected since I have been in Missouri with the Texas & St. Louis; I constructed it and was president of it for six years.

Q. Were you connected with railroads at any time prior to that?

A. Yes, sir; I was president of the Tennessee & Pacific in Tennessee before I came here, and operated it for four years.

Q. Do you know the location of the Wabash road from the Union depot out West to Ferguson, in St. Louis county?

A. Yes, sir; I have been over it.

Q. How long have you lived in St. Louis?

A. About thirteen years.

355 Q. From your knowledge and experience in operating railroads, will you please state, where one railroad has made a contract to permit other railroads to use its right of way and track at its terminus—for instance, the Wabash road from the north line of Forest park to Eighteenth street—for such compensation as may be reasonable and just, what would be a reasonable and just compensation under such a contract for the use of the right of way of the Wabash road between the north line of Forest park and Eighteenth street?

Counsel for defendants objects to the question as not conforming to the facts in the case. Objection overruled. Defendants except.

A. Well, if you admit the right of other railroads to run on this track, as already conceded, then the only proper basis to get at the compensation, in my opinion, would be a wheelage basis.

Q. How about the cost of maintenance; how would that be divided?

A. My rule of getting at that would be to take the cost of construction and then the cost of maintenance of that portion of the road and divide the interest on the cost of construction and the cost of maintenance between the two roads in proportion to their use. I think that is the only equitable basis you can get at, if you admit the other road has the right to run cars on it—the right to the use of it.

Cross-examination by Mr. PRIEST:

Q. In what capacities have you been connected with the operation of railroads?

A. I have been president and general manager. I have had charge of the operations of roads as well as the construction.

356 Q. Have you had the immediate charge of the operations of roads or have you conducted the operations of a road through a superintendent?

A. Sometimes I had a superintendent and sometimes I had not.

Q. Did any of the roads with which you were connected have occasion to make contracts for the operation of their trains independently over a part of the line of any other railroad?

A. Yes, sir; the Tennessee & Pacific, which is a branch of the Nashville & Chattanooga, ran from the south line of the city on the Nashville & Chattanooga tracks.

Q. To what extent?

A. About a mile—something over a mile; a mile and a half probably.

Q. Did they do that under a contract?

A. Yes, sir.

Q. Were the two roads allied together in any way in their operation at that time?

A. Not at all at that time.

Q. By the interchange of traffic or otherwise?

A. We interchanged some traffic, of course, but not to any great extent.

Q. They were not competitors?

A. No, sir; I could not say they were competitors.

Q. What was the basis of their running arrangements in that case?

A. I think all they charged us was just simply our proportion of the cost of maintenance. I don't think they took into consideration the cost of construction at all, but that was regarded by them and by me as more favorable terms than usual.

Q. What other instance do you have in mind?

A. I do not know that I can think of any other instance now, but there are plenty of such cases.

Q. Coming under your observation?

A. Not exactly, but they are familiar to all railroad men.
357 Wherever they make a running arrangement I think those are the terms they all make.

Q. I want you to speak from your individual knowledge, your personal knowledge, of the matters and not from rumors.

A. That is the only instance that has come within my personal knowledge, only as a matter of common report.

Q. Suppose that you owned a part of a line of railway some four miles in length comprising the principal part of your terminal facilities into a large metropolis; that it cost you in the neighborhood of a million and a quarter to a million and a half of dollars, and you were about entering into arrangements for another railway to run its trains independently of your management over that portion of your road. What, in your opinion, under circumstances of that kind, would be a reasonable compensation for the plant, as well as the privilege of operating over the road?

A. I don't understand the question exactly. It would contemplate, you mean, to sell the plant?

Q. No, sir.

A. As I understood the question in the first place, it did not contemplate to interfere with your use of it at all.

Q. No, sir; that is not my question. My question is there just as I put it. You take into consideration the plant, the cost of the plant, the fact it is the only means of access or egress from a metropolis, and it is the principal terminus of your road, and another road is to operate its trains independently of your management, furnish the motive power, the employés, and all equipments?

A. Well, that would turn on the question of whether I had the right to keep them off of the piece of the road or not.

358 Q. I am not speaking of that right. I say, taking those facts into consideration, what would be a reasonable compensation if you were to make a contract for a road to take a road costing this amount and entering a metropolis such as this is—what, in your opinion, would be a fair compensation for such a use by the road?

A. I do not think I can answer the question any better than I answered the original question—take into consideration the cost of the construction, which can be gotten at with reasonable certainty, the cost of maintenance, and then each of the lines will pay its proportion in proportion to its use.

Q. Well, you would give the company owning the road no compensation for its plant whatever?

A. Give it the interest on the cost of construction. That is all that roads ever get.

Q. Give it the interest on the cost of construction?

A. Make that a part of the cost.

Q. Is not that interest consumed by the wear and tear of the other road operating over it?

A. It is repaired and kept up by the maintenance. The maintenance is a part of the repairs.

Q. What interest would you allow?

A. That is the question. Usually six per cent.; some allow five per cent.

Q. What do you mean by usually in that sense?

A. Nearly all railroad bonds of construction are six per cent. bonds.

Q. Have you any knowledge of the cost of operating over the Union depot tracks in St. Louis?

A. No, sir; I have not. I have never seen any figures.

Q. Have you any knowledge of what the Wabash pays for its access over the lines of another road into Chicago?

A. No, sir.

359 Q. Or Quincy?

A. No, sir.

Q. Or Kansas City?

A. No, sir; I have no definite knowledge of that; but those things are generally regulated by the power the road has got. If it has got the power to charge you an arbitrary compensation it generally does it; if it has not the right to do it under its charter or its contract with other roads, then it has come to an equitable basis.

Q. What instance have you in mind illustrating the difference between these two propositions which you state?

A. Take the San Francisco and the Missouri Pacific here. They claimed they had the former road in its power and they charged it what I would consider a round sum to come in on their tracks.

Q. Do you know what they paid?

A. I could not give you the figures. I have heard the figures discussed between railroad men often.

Q. Have you heard it discussed between the officials of the two roads—the Missouri Pacific and the San Francisco?

A. I do not know whether between the officials of the two roads together, but I have heard it discussed by the officials of both of those roads.

Q. You do not know what they charged?

A. I would not pretend to give the figures.

By the MASTER:

Q. I would like to ask you two or three questions. You put the basis of the division of interest on the cost of construction. Suppose that the value of the property had largely increased between the time of its original construction and the time at which the other road seeks to use the track, would you limit in that case the interest on the cost of construction or place it on the basis of the actual value of the plant?

360 A. Well, I should think the actual cost of construction, if the right to run on the road was conceded, would be on the original cost of construction; that the increase in value had nothing to do with it.

Counsel for defendants moves to exclude the testimony of the witness on the ground that he has not shown himself competent to testify in the matter, and the master denies the motion. Defendants except.

The master sustains the objection to the contract between the commissioners of Forest park and the St. Louis County Railroad Company, dated October 29th, 1872, which was offered in evidence yesterday, on the ground that it is not properly authenticated.

E. H. BROWN, sworn on the part of the intervenors, testifies as follows:

Direct examination by Mr. ORRICK:

Q. You are the vice president of the St. Louis, Kansas City & Colorado Railroad Company?

A. Yes, sir.

Q. Will you state whether the line of the St. Louis, Kansas City & Colorado road has been located from Forsyth junction to Forest park?

A. Yes, sir.

Q. When was it—prior or since the filing of these proceedings?

A. Prior to the filing of the proceedings.

Q. How is it located?

A. It crosses the Wabash and follows on the north side.

Q. At Forsyth junction?

A. At Forsyth junction, and goes on the north side of the park.

Q. Please state what proceedings, if any, have been taken to acquire the right of way from Forsyth junction to the north line of the park.

361 A. The company has commenced proceedings to condemn the right of way.

Q. And they are now pending?

A. Yes, sir.

Cross-examination by Mr. PRIEST:

Q. You mean the line has been only surveyed?

A. No, sir.

Q. Has it been definitely located and determined upon?

A. That is my understanding.

Q. From whom did you derive that information?

A. I understand from the engineer.

Q. From whom did you derive the understanding?

A. That is the action of the company. There are proceedings in condemnation.

Q. Condemnation against whom?

A. Against the parties.

Q. What parties?

A. Forsyth junction.

Q. What are the names of the parties?

A. I do not know.

Q. Have you ever seen the petition that was filed; how do you know you have begun condemnation proceedings?

A. I have seen the petition. I have not read it. I have read a portion of it.

Q. Do you know it has been filed?

A. I know the company has ordered it done.

Q. Have you ever been over the ground and seen the location made by the engineer?

A. No, sir.

Q. Or the company with him?

A. No, sir.

Q. The only information you have of it is from the engineer?

A. I know the fact that the company ordered it done. I know that from the engineer having done the work. I have seen
362 the profile of the line run and located by him and know that proceedings in condemnation have been commenced against the parties between those points.

Q. Whom did you learn that from—that proceedings in condemnation had begun?

A. I know the company ordered it done.

By Mr. ORRICK:

Q. Did you see the publication in the paper?

A. I do not know whether I have or not.

JULIUS PITZMAN, sworn on the part of the intervenors, testifies as follows:

Direct examination by Mr. ORRICK:

Q. You have been examined before in this case as to the valuations of the right of way?

A. Yes, sir.

Q How long have you resided in St. Louis?

A. Since 1854.

Q. What experience, if any, have you had in gaining a knowledge of the values of real estate in this city, say, between Eighteenth street and the north line of Forest park, along the line of the Wabash railway?

A. In 1863 I was elected county surveyor of St. Louis county, and it was my duty to act in that capacity as commissioner in all suits of partition. I held that office for nine years, and of course I posted myself as to the value of property in general in the entire city of St. Louis. I was afterwards called upon by the railroad companies in almost all large cases to act as commissioner in condemnation proceedings for the condemnation of property for railroad purposes. I have acted as commissioner for the St. Louis & Iron Mountain, for the Missouri Pacific, and for the Wabash.

363 Q. On this very line mentioned?

A. Yes, sir; I not only acted on the Wabash as commissioner by appointment of the court, but Charles Green, who was the agent to make the purchase for Ben. Lewis, the president of the Wabash, could not come to terms with a number of people who owned land along the line of the road, and Mr. Lewis and Mr. Green told me to go and buy the property, they leaving the question of prices to a great extent to my judgment in the matter.

Q. Now, you have examined the line of the Wabash from Eighteenth street to the north line of the park and know where it is?

A. Yes, sir.

Q. Will you please state to the court what is the present value of the right of way of the Wabash, covering, say, sixty feet wide from Twenty-first street to the park and through the park to the north line thereof, the right of way being forty-two feet wide in the park, and the other sixty feet down to Twenty-first street?

A. Sixty feet from the west side of Mercer to the park and forty-two feet wide through the park?

Q. Yes, sir.

A. Considering it is salable property, the lots, I would consider the highest market value of the property to be $489,932.

Cross-examination by Mr. PRIEST:

Q. You testified once before in this case?

A. I did.

Q. Is the estimate you now make any different from the estimate you made while on the stand before?

A. No, sir; except in this case that the question omitted property between Tayon avenue and Mercer and added the right of way

through Forest park and thirty feet wider. The question
364 was differently formed. It is based on the same valuation, the bulk of it being the same property.

Q. Is the valuation this time larger than before?

A. No, sir; precisely the same, only the quantity of land to be valued is doubled.

Q. What, in your opinion, would it cost a railroad company to acquire a right of way through this property adjacent to the Wabash railway from the north line of Forest park to Eighteenth street?

Counsel for the intervenors objects to the question as incompetent. Objection overruled. Intervenors except.

A. I could not give the precise amount because it would take a number of buildings, and I would not undertake to pass upon that without going along the line and determining the value of each building.

Q. Would it cost in the neighborhood of one million dollars?

A. Sixty feet wide?

Q. The same width as the Wabash.

A. I think it would take the shot tower and the Pullman palace car shops.

By Mr. ORRICK:

Q. Not next to Wabash?

A. Yes; that is the next to the Wabash. You see I cannot tell precisely how the buildings stand with reference to the line. In making the valuation I have given the full value, and you may safely say the valuation I have made includes the damages to the remainder, so the only thing to be added to my valuation would be the destruction of the buildings along the line, and I should not be at all surprised that the damage to buildings would run to a quarter of a million dollars, and the damage to the remainder of the
365 improved property I think one-half a million would be too much. I think a quarter of a million would amply cover it.

By Mr. PRIEST:

Q. You think it would cost from $750,000 to $1,000,000?

A. No; I would make it from $489,000 to three-quarters of a million.

L. B. JONES, sworn on the part of the intervenors, testifies as follows:

Direct examination by Mr. ORRICK:

Q. You reside here in the city?

A. Yes, sir.

Q. What is your business?

A. Real estate.

Q. What familiarity have you with property from Eighteenth

street to the north line of Forest park, along the line of the Wabash railroad?

A. I have assisted in purchasing upwards of a million dollars' worth of property—probably over that—for the bridge company, or rather the Union Depot Company or the terminal railway.

Q. You have made a specialty of that business?

A. Yes, sir. I have done nothing else for the last ten years.

Q. Did you make an estimate, of this strip of ground—say sixty feet wide from Twenty-first street to the east line of the park and forty-two feet through the park to the north line thereof—with Mr. Pitzman, who just testified?

A. Yes, sir.

Q. Now, from your knowledge of values at the present time, please state to the court what would be the value of that strip of ground.

A. Well, we made the same estimate precisely in figures; simply doubled it from thirty feet to sixty feet—doubled the price. The same figures and the same paper were used. I have the same figures added to the same estimate we made before.

366 Q. Who is in possession of that property, if you know, between Eighteenth and Twenty-first street on the north side—that is, between Tayon avenue and Mercer street?

A. I understand that belongs to the terminal railroad company, or rather the transit company, or at least the bridge company and the Wabash. Now, how much belongs to the Wabash and how much to the transit company I do not know. You see here is a strip marked——

Q. Where is the Anchor Mills?

A. Twenty-first street.

Q. Isn't that property used in connection with the Anchor Mills?

A. That is adjacent to the Anchor Mills. This in red belongs to the bridge company.

Q. That is what I am talking about—that which is in red.

A. Yes, sir; this is occupied by coal cars and switching to the Anchor Mills.

Q. It is not used by the Wabash?

A. I don't think it is; I am not positive. I always understood that was for the bridge company's tracks.

Q. Their right of way is only thirty feet from Eighteenth street to Twenty-first?

A. Yes, sir; that is what I have always understood.

Q. $477,000; is that the estimate?

A. We estimated it is worth that; from that to half a million dollars, to be liberal.

Q. What were your figures; have you got a memorandum there?

A. Yes, sir; the same figures, $489,932, putting it on the basis of the other three, say $500,000.

Q. Are you acquainted with the tracks of the Wabash road from Ferguson to North Market street and down on the river side of the city?

A. No, sir; I am not. I have never paid any attention to anything upon the river.

367 Q. Do you know whether the Wabash brings any of its traffic in on any of those tracks?

Defendants' counsel objects to the question as incompetent. Objection sustained. Intervenors except.

Cross-examination by Mr. PRIEST:

Q. What would it cost a railroad to acquire a right of way from the north line of Forest park into Twenty-first street through this same property adjacent to the Wabash, in your opinion?

Counsel for the intervenors objects to the question as incompetent. Objection overruled. Intervenors except.

A. Well, I do not think they could do it.

Q. I don't ask you about the possibility, I ask you what it would cost?

A. I do not know. As a matter of course, I am not a judge, but I would say they could not do it.

Q. Why?

A. Because it belongs to the 'Frisco.

Q. On the north side?

A. Yes, sir; to Twenty-third street.

Q. Taking now the possibility and leave out of consideration the 'Frisco road?

A. I would say a quarter of a million dollars would cover the value of the houses.

Q. Did you have any conversation with any one else in regard to this and the probabilities of the cost of a new road from Forest park into the Union depot in which you placed the estimate in the neighborhood of a million of dollars to a million and a quarter?

A. On the basis of 120 feet deep—yes, sir; I think it would. I think it would cost twelve hundred thousand dollars 120 feet deep, taking the houses, the shot tower, the Palace Car Company, and the malt-house on the basis of 120 feet. 60 feet—I do not think it would cost over a quarter of a million dollars extra on that basis.

368 Q. Does that include the damage done the other property?

A. I should say so, but, as I say 120 feet, that is a different thing. We based this on 120 feet deep and a half of that value for 60 feet.

Q. Why do you estimate it 120 feet in depth?

A. The lots average about that in depth.

Q. Why do you estimate that as the average depth of the lots?

A. That is the question I was asked, what lots were worth 120 feet deep; that was the question I was asked. We were also asked about sixty feet, and we gave the price at half the value. What the buildings would cost I could not tell until I bought them, but I should not think a quarter of a million, but if you were compelled to take the whole 120 feet, which in some places you might be and in some you might not, I think it would cost a million to a million and a quarter, taking the houses and all. In a great many cases you would not have to take all.

At this point the further hearing of the matter was adjourned until 11 a. m. September 4th, 1886.

Pursuant to adjournment, as above stated, on September 4th, 1886, the intervenors appeared, by John C. Orrick, Esq., and the defendants, by H. S. Priest, Esq., and the hearing of the case was resumed.

H. W. GAYS, sworn for intervenors, testifies as follows:

Direct examination by Mr. ORRICK:

Q. Where do you reside?

A. In St. Louis.

Q. What is your business now?

A. Manager of the Wiggins Ferry Company and the leased lines.

Q. What was your business prior to that time?

A. For twenty-six years I have been connected with railroads.

369 Q. What position did you occupy prior to your position with this company?

A. General freight agent of the Indianapolis & St. Louis railroad.

Q. Here at St. Louis?

A. Yes, sir.

Q. From your experience are you more or less familiar with the operations of railroads?

A. I am.

Q. You have been connected with them, you say, for twenty-six years?

A. Twenty-six years.

Q. What lines has the Wiggins Ferry Company?

A. The East St. Louis Connecting railway, and it operates the Venice & Carondelet Belt.

Q. You are the manager?

A. Yes, sir.

Q. I will ask you to state from your knowledge of railway operations and business what would be a fair and equitable basis for one connecting road to charge another for the use of its right of way, as, for example, the Wabash, St. Louis & Pacific railway, from the north line of the park in this city to Eighteenth street, upon the hypothesis that there is a contract existing whereby the Wabash, St. Louis & Pacific Railway Company is bound to permit other roads to use its right of way between the points named for a fair and equitable compensation?

Defendants' counsel objects to the question for the reason that the witness has not shown himself conversant with railroad matters in the particular concerning which it seeks to elicit his opinion. Objection sustained.

Q. I will ask you to state whether in your experience in connection with roads you know of any cases where one road has used the track of another for coming into the city of St. Louis or East St. Louis; and, if so, what road and on what terms?

370 A. The C., B. & Q. comes into East St. Louis over the Indianapolis & St. Louis railroad.

Q. How far?

A. Twenty-two or twenty-four miles.

Q. Does the I. & St. L. own all the terminals they use in East St. Louis?

A. Yes, sir—that is, the C., B. & Q. has no use of terminals, only their water and side track for the purpose of passing trains; they have no use of terminals for the conduct of their own business.

Q. Your terminals are similar to those of the Union depot here—they are independent?

A. Yes, sir.

Q. I will ask you whether the Wabash has the use of the Union depot terminals, whether they own them or they are a separate institution?

A. They are a separate institution between the Wabash and Union depot.

By the MASTER:

Q. Are you sufficiently acquainted with the terms upon which one road runs over the track of another, as to compensation, to give an opinion as to what would be a fair and reasonable compensation for the use of the track of one road by another?

A. I would hate to pass judgment on my own ability. I have had the knowledge of twenty-six years in the railroad business in all departments and have had more or less to do with making arrangements of that character; as to my opinion of the value to be placed on it, I have nothing to do with that at all.

The master rules that the witness is qualified to answer the question propounded by Mr. Orrick.

Q. Please answer my first question.

A. My knowledge, I will state beforehand, is to this extent: In the case of the Q. that matter was worked up and gone over
371 by me, and it was on my recommendation that the contract was executed by the officers of the company who were the proper ones to execute such a contract.

Q. Now answer my first question. What would be a fair basis under the facts I have supposed?

A. In addition to that you mentioned the right of way. Do you mean the use of tracks?

Q. The use of tracks. What would be a fair basis for the use of that track per annum, and on what basis should the compensation be arrived at?

A. Under the contract it takes the power away from the road to obtain the best terms it can. The expenses of all character, the capitalization of the whole thing, should, in my judgment, be divided on the traffic revenue, whatever that might be.

Q. What is that otherwise called?

A. Either tonnage or wheelage, or whatever is a unit that can be arrived at.

Q. The wheelage basis?

A. Yes, sir.

Defendants' counsel objects to this examination. Objection overruled.

Q. What is that based on?

A. On the freight. The total amount of traffic is arrived at from the reports of the transactions of each road over that particular piece of road—that is one way to arrive at it—on the freight business, and the number of passengers carried is compared; that practically throws it on the revenue, and another basis is the wheelage basis to count the number of cars. It is difficult to arrive at it on the passenger business.

Q. State whether there is any substantial difference in those two bases.

A. The difference in that respect would be this: that by counting the cars you would have it absolute that it is in the wearing out of the track and the conduct of the affairs pertaining to the track.

372 Q. What were the terms of the C., B. and Q. contract?

A. Well, the terms of the contract is that they pay ten cents per ton for all freight passing over the twenty-four miles.

Q. How many tons in a car?

A. That varies from ten up as high as twenty-five. The average, I should say, would probably be twelve tons with the Q., because they are heavily loaded with grain and ice. There is no charge for empty cars.

Q. Then on a tonnage basis there would be no charge for empty cars?

A. Not on the Q.; there is no charge there.

Q. In speaking of a tonnage basis?

A. No; there would be no charge because there could not be.

Q. There would be on the wheelage basis?

A. Yes, sir; each car would then represent a value.

Q. Then where the compensation is to be fair and equitable, which, in your opinion, would be the most equitable, a tonnage or wheelage basis, with reference to the wear and tear of the track?

A. I should prefer to have it on the wheelage for the reason that is absolute.

The MASTER: It is a question of fairness and an equitable arrangement between roads and not a preference that Mr. Orrick is after.

By Mr. ORRICK:

Q. Which is the most equitable?

A. The only equitable way is to put it on wheelage, each car paying its proportion.

Cross-examination by Mr. PRIEST:

Q. You have been, you say, twenty-six years connected with railways in various official relations?

A. Yes, sir.

373 Q. What official relations and with what roads?

A. I was on the Indianapolis & St. Louis for about four years as general freight agent, on the Cleveland, Columbus, Cincinnati & Indianapolis about two years as assistant general freight agent, and prior to that time I was general agent.

Q. General freight agent?

A. Assistant freight agent of the Bee Line and general freight agent of the Indianapolis & St. Louis. In saying twenty-six years with railroads it was hardly right to express it that way, although when connected with the river I attended to their railroad business for them. I was there about eight years. Prior to that I was with the Buffalo & Erie, and prior to that with the Erie.

Q. What position with the Buffalo & Erie?

A. Cashier with the Buffalo & Erie at a transfer station, and with the Erie railway I was telegraph operator and train dispatcher in the superintendent's office.

Q. You say you had charge of some river business. What river business?

A. I had charge of the traffic of a line of boats that ran between Louisville & Cincinnati some years.

Q. How long have you been connected with the Wiggins Ferry Company as general manager?

A. Since June. Prior to that time I was there as superintendent.

Q. June of this year?

A. Yes, sir.

Q. How long as superintendent?

A. I went with them last year, 1885.

Q. What were your duties as general freight agent and freight agent with the several companies you have mentioned?

A. On the Indianapolis & St. Louis I had charge of their
374 freight traffic of all kinds, and on the C., C., C. & I., as assistant freight agent, I had charge of all their traffic, reporting to the general manager.

Q. Did your experience in either of those positions give you an oversight or any experience in the management of the transportation department?

A. Yes, sir; on the C., C., C. & I., and more especially the Indianapolis and St. Louis.

Q. What did you have to do with train service, the maintenance of track, and contracts regarding operations over its line of railway?

A. The maintenance of track is another question entirely; I did not mention that. As general freight agent anything in the transportation department that affected the freight business I had something to do with.

Q. So far as fixing rates?

A. The general movement of property or any contract affecting it or where other roads sought access over that road.

Q. What other roads besides the C., B. & Q. used any portion of the Indianapolis & St. Louis?

A. The Q. is the only one here.

Q. How many contracts of that kind did you have occasion to

become connected with or assist in making during all your experience as a railroad man?

A. The Q. contract was the most direct, although with the C., C., C. & I., in the case of the Atlantic & Great Western, where they reach Cincinnati over fifty-six miles of that track, similar questions came up.

Q. Did you have anything to do with adjusting the terms on which the arrangements were made?

A. Yes, sir.

Q. What arrangements were made?

A. In the case of the Atlantic & Great Western?

375 Q. Yes.

A. Finally it was settled that the traffic was settled on a percentage basis of the revenues on the traffic.

Q. Now, in the only two instances in your experience as a railroad man where a case similar to that supposed to you by Mr. Orrick occurred the arrangement was made entirely on a different basis from that which you have testified would be a fair and reasonable basis?

A. Yes, sir; because the element in the case of the Q. was that they sought entrance over our tracks without a previous contract.

Q. Then you make a distinguishing feature in your testimony of one element with which you have had no previous experience whatever?

A. That is the element of a previous contract; yes, sir.

Q. You never made an arrangement where one railroad had a right by a previous contract to go over the line of another?

A. No, sir.

Q. So that element in the hypothetical question is an entirely novel one to you, and you are giving your impressions as any man would on the question being presented to him?

A. I do not know as any man would. I am giving you my opinion.

Q. You do not pretend to be an expert about that element of the hypothetical case propounded to you by Mr. Orrick?

A. I am no expert on anything.

Q. Now, so far as your experience extends concerning such contracts as those, they depend altogether upon the individual judgments of the parties to the contract and the status of their property with reference to each other?

A. As I understand, the one party in seeking——

376 Q. I am not asking you about this particular case—you misapprehend my question.

A. As I understand you, your question is with regard to the two instances I have cited.

Q. Yes, sir; the Q. and Atlantic.

A. Yes, sir; in which case the element of a previous contract did not exist, if that is the answer to your question.

Q. In those two cases the contracts were not alike?

A. No, sir.

Q. They differed?

A. Yes, sir.

Q. They depended upon the individual judgment of the parties to the contracts?

A. Yes, sir.

Q. As to what would be fair in their minds?

A. Yes, sir; that was the state of affairs.

Q. So, then, so far as your knowledge as an expert extends, there is no usual or customary basis for the making of such contracts?

A. I am not an expert.

Q. Mr. Orrick says you are.

A. I am not an expert in making contracts. I cite you the two cases we did make and give you my opinion as to what would be fair.

Q. In giving your opinion as to the proper basis of compensation as to this particular case, you are not giving that opinion as an expert, but simply giving your opinion as an individual man?

A. Based on the experience of twenty-six years handling property of corporations.

Q. Then you are testifying as an expert?

A. To that extent.

Q. Then your experience is that there is no usual or uniform contract concerning such running arrangements?

A. I do not quite understand that.

Q. That question seems to be plain to me.

377 A. If you will just repeat it maybe I can understand what you refer to.

Q. Then your experience as a railroad man is that there is no usual or customary basis for the making of such contracts; that the contracts vary and differ in their considerations as the circumstances and relations of the parties differ?

A. Did you refer to the two contracts of the Atlantic and Q.?

Q. No; I am referring to a general experience.

A. My general experience is, so far as I know, that contracts come up right on their merits.

Q. Depending upon the circumstances?

A. Yes, sir; unless there was a previous contract, which changes all that and does not give the contracting parties power to act for themselves.

By Mr. ORRICK:

Q. In other words, where there is no previous contract it is arbitrary?

A. It is agreed to as between the parties; it comes right up on its merits, and the party who has the road tries to get all he can out of the party who tries to use it.

EUGENE HAAS, sworn for intervenors, testifies as follows:

Direct examination by Mr. ORRICK:

Q. What is your occupation?

A. I am a book-keeper and clerk of the park commissioners of this city.

Q. How long have you been employed there in connection with the park commissioners?

A. Since September, 1877.

Q. Will you please state how long, to your knowledge, this
378 paper has been on file in the park commissioners' office?

A. Ever since I have been clerk. When we moved the office it was taken from a large safe to a smaller one.

Q. Did you find it there when you went there?

A. I found it there when I made an inventory of all the papers in the safe. I have the inventory yet; I numbered them.

(The paper referred to by the witness is a paper purporting to be a contract between the commissioners of Forest park and the St. Louis County Railroad Company, dated October 29th, 1872.)

Counsel for intervenors offers in evidence, under the following stipulation, an abstract of the Sterling & Webster Abstract Company, marked Exhibit D:

"It is stipulated and agreed between the parties hereto as follows:

First. That the several lots or tracts of land indicated in red on chart A and marked "Grover" were obtained by the St. Louis, Kansas City & Northern Railway Company through the several conveyances mentioned in the certificate of the Sterling & Webster Abstract Company, which certificate is admitted in evidence and marked Exhibit D.

Second. It is admitted that the several lots and tracts of land now constituting defendants' right of way between Forest park and the Union depot not indicated in blue or marked "Grover" on chart A were obtained by the St. Louis, Kansas City & Northern Railway
Company from divers persons by purchase and condemna-
379 tion, as stated in defendants' answer, but as to the cost thereof no admissions are intended to be made by the parties.

(Signed) NOBLE & ORRICK,
Solicitors for Intervenors.
H. S. PRIEST,
For Defendants."

At this point the further hearing of the matter was adjourned until 10 a. m. September 6th, 1886.

Pursuant to adjournment, as before stated, on September 6th, 1886, the hearing of the case was resumed as follows:

The following stipulation was offered in evidence, and same was marked Exhibit "E:"

"It is hereby stipulated that said St. Louis, Kansas City and Colorado Railroad Company duly located its line of road in the city of St. Louis on the — day of May, 1886, and that said line crosses the said Wabash, St. Louis & Pacific railway at Forsyth junction, in said city, thence along and adjoining the north side of the right of way

of said Wabash, St. Louis & Pacific railway to the northern line of Forest park, in said city, and on the — day of August, 1886, proceedings to condemn a right of way forty feet wide on said line were duly filed in the circuit court of the city of St. Louis by said St. Louis, Kansas City & Colorado Railroad Company against the owners of the land between Forsyth junction and the northern line of said park, and such proceedings are now pending.

It is further agreed and stipulated that there shall be
380 deemed and considered in evidence in this cause so much of the record in the principal cause, entitled 'The Central Trust Company of New York *et al. vs.* The Wabash, St. Louis & Pacific Railway Company *et al.*,' as either party may consider relevant to the issues herein.

(Signed) NOBLE & ORRICK,
Solicitors for Intervenor.
H. S. PRIEST,
For Defendants."

This was all the testimony introduced by intervenor in chief.

Defendants, to sustain the issues upon their part, offer evidence as follows:

WELLS H. BLODGETT, sworn for the defendants, testifies as follows:

Direct examination by Mr. PRIEST:

Q. Were you connected in any way with the construction of the line of the St. Louis, Kansas City and Northern Railway Company, now the Wabash, from Ferguson station through Forest park to the Union depot?

A. I was at that time the general attorney of the St. Louis, Kansas City & Northern Railway Company and had charge of the matter of acquiring the right of way—that is, of the condemnation proceedings and of the preparation of all of the deeds and conveyances where property was purchased from parties without condemnation.

Q. Do you know from whom the St. Louis, Kansas City &
381 Northern Railway Company acquired any portion of the right of way for its railroad between the points just mentioned?

A. It acquired a portion of the right of way through a conveyance from the St. Louis County railroad, which is in evidence in this case, marked Exhibit C, and then it obtained the remainder from a great many different persons owning small tracts or small interest in the tracts. I could not give the names of the parties.

Q. Look at the paper I now hand you and state what it is.

A. This is a copy of the articles of association of the St. Louis County Railroad Company as certified by Mr. McGrath, secretary of state.

Q. State on what date that company was organized.

A. It appears from that certificate that the company was organized on the 25th day of August, 1871.

Defendants' counsel offers in evidence the paper referred to, and same was marked Exhibit F.

Q. Do you know of any deed having been executed to the St. Louis County Railroad Company for a right of way through what is now Forest park?

A. I know of a deed having been made to the county railroad by Mr. W. D. Griswold.

Q. Look at this paper and state what it is.

A. It purports to be a certified copy of a deed executed November 3rd, 1871, by W. D. Griswold to the St. Louis County Railroad Company for a right of way 40 feet in width through what is now Forest park. This purports to be a copy of the deed as of record in the recorder's office of the city of St. Louis, certified by D. H. McAdam, recorder.

382 Q. What is the date of that deed?

A. I stated before, November 3rd, 1871.

Defendants' counsel offers in evidence the deed referred to, and same was marked Exhibit G.

Q. You are at present general solicitor for the receivers of the property of the Wabash, St. Louis & Pacific Railway Company?

A. Yes, sir.

Q. Who is now operating the Wabash, St. Louis and Pacific Railway Company, and how long have they been operating it?

A. The road is now operated by Solon Humphreys and Thomas E. Tutt, receivers under the order of this court dated May 27th, 1884. Since that date the property has been in the hands of and operated by Humphreys and Tutt as receivers.

Cross-examination by Mr. ORRICK:

Q. Did you represent the St. Louis, Kansas City & Northern Railway Company in its negotiations which led up to the agreement of August, date 11th, 1875, between the St. Louis County railroad and the St. Louis, Kansas City & Northern railroad, and also the tripartite agreement, of the same date, between the commissioners of Forest park, the St. Louis County railroad, and the St. Louis, Kansas City & Northern Railroad Company?

A. I was present with Mr. Lewis during a great many interviews that were had between Mr. Sharp more particularly and Mr. Kasson and Col. Broadhead and others who were interested in the county road, in which the terms of the agreements were outlined and discussed. At one or two of those meetings I met Mr. Sharp at Mr. Sharp's office, and had one or two interviews at the railroad office, at which time Col. McKinley was present.

Q. You were the general solicitor?

383 A. At that time I was the general solicitor of the St. Louis, Kansas City & Northern Railway Company. Before the contracts were written out I met with an accident—my leg was broken—and the negotiations were consummated and the agreements were written out and signed while I was confined to my house, and I was not present. I did not prepare them.

Q. Pending those negotiations what discussion, if any, took place between yourself and the Forest park commissioners, or in your presence, with reference to the contract of October 9th, 1872, made by the St. Louis County Railroad Company with John Withnell, Joseph O'Neil, and H. W. Leffingwell?

A. I cannot say that there was anything said about that contract except merely that there was or had been such an instrument. I don't recollect that it was considered as cutting any important figure. I simply recollect that in talking about the situation it was mentioned, and that is all I can recollect. I had forgotten it until the other day when it was mentioned here.

Q. Do you remember that among the terms of that contract that was discussed was this, that the county railroad under that contract was to pay the Forest park commissioners one and a half cents per round trip for its passengers over the road from the Union depot to the park?

Defendants' counsel objects to the question as incompetent. Objection overruled. Defendants except.

A. I don't recollect that any specific provision of the contract mentioned was referred to or discussed.

384 Q. The property between Eighteenth street and Twenty-first street, where the Anchor Mill is located, formerly owned by the St. Louis County road, lying north of the 30-foot strip acquired by the Kansas City & Northern Railway Company from the St. Louis County road in 1875—does the Wabash road now own that property, or is it in the possession of the bridge company?

A. The property owned by the St. Louis County Railroad Company prior to August 11th, 1875, and not conveyed on that date by the county road to the St. Louis, Kansas City & Northern, was afterward mortgaged by the county road, and by means of conveyances the title was acquired by the St. Louis, Kansas City & Northern. Those conveyances are shown by the certificate of the Sterling & Webster Abstract Company in evidence.

Q. My question was whether they had not sold that piece between Eighteenth and Twenty-first streets to the bridge company, that portion lying just south of the Anchor Mills, between the Anchor Mills and the original 30-foot strip acquired by the St. Louis, Kansas City and Northern from the St. Louis County road.

A. My recollection is that there was one piece of ground between Eighteenth and Twenty-first streets that was purchased from Haussler by Mr. Grover for the bridge company or for the Union Depot Company, I cannot tell which, and that was conveyed from Grover to the Union Depot Company or the bridge company. The balance of the real estate of the county railroad company was conveyed by Grover to the Kansas City & Northern Railway company.

W. S. LINCOLN, sworn for defendants, testifies as follows:

385 Direct examination by Mr. PRIEST:

Q. You are chief engineer for the receivers of the Wabash, St. Louis & Pacific Railway Company?

A. Yes, sir; I am.

Q. Prior to the time the receivers took possession what position did you occupy with reference to that road?

A. I had the same position with reference to the Wabash, St. Louis & Pacific Railway Company.

Q. Are you familiar with the road-bed of the Wabash, St. Louis & Pacific Railway Company through Forest park?

A. Yes, sir; I am to some extent.

Q. I will get you to state the greatest width of the roadway through Forest park, excluding the toe of the embankments and the slope of the cuts.

A. The greatest width occupied now where they are is 38 feet.

Cross-examination by Mr. ORRICK:

Q. Please state to the court whether that is a sufficient width for two tracks.

A. Yes, sir; that is sufficient for two tracks at that point.

By Mr. PRIEST:

Q. Do you know what the average width of the grade is? You have stated the greatest width. What do you know is the average width?

The MASTER: Is that confined to the park, Mr. Priest?

Mr. PRIEST: Yes, sir.

The WITNESS: I don't know that I can state what the average width is.

By Mr. ORRICK:

Q. I will ask you one question more. What is the width from the park in—the right of way from the park to Eighteenth street?

A. I don't know that I can state that. It is irregular widths at different places.

386 Q. You don't know what the width of the right of way is from the park in?

A. No, sir; I could not state.

By the MASTER:

Q. What is the width of the construction of the road as it at present exists from the park in to Eighteenth street?

A. That varies, of course, with the height of the embankment or the depth of the cut.

Q. Is there room on the road as constructed for a second track?

A. At some points there is, but not generally.

By Mr. PRIEST:

Q. How long have you been acquainted with this road-bed through Forest park?

A. About five years.

Q. Has there been any change in it since you first knew it as to its width?

A. Substantially, it has been the same width ever since I first knew it.

This was all the testimony introduced by defendants.

Counsel for intervenor, in rebuttal, offers in evidence the act of March 25th, 1872, establishing Forest park.

Defendants' counsel objects to same because the act itself is void as being in conflict with the constitution, and states that the supreme court of this State has so held.

The master overrules the objection on the ground that it is competent to show the constitution of the *de facto* board of park commissioners which subsequently conveyed the right of way of 70 feet through the park, which right was recognized by the Legislature in the passage of its act constituting the second board of park commissioners.

Defendants' counsel excepts to the ruling of the master.

Counsel for the intervenor offers in evidence the con-
387 tract between the commissioners of Forest park and the St. Louis County Railroad Company, dated October 9th, 1872.

Defendants' counsel objects to same as irrelevant, incompetent, and inadmissible for any purpose, and also because the act under which the commissioners making the contract were acting is void.

The MASTER (to Mr. Priest): Does your objection go to the extent of denying that the contract was actually executed by the board constituted under that first act and the president of the St. Louis County railroad at that time or, do you admit it was executed?

Mr. PRIEST: I admit the physical execution by the parties whose names appear as commissioners.

The MASTER: And that they were the parties named as the board under the act which you say was declared void?

Mr. PRIEST: I presume that is true. I admit they were pretending to act as the commissioners named in the act of 1872.

The MASTER: With this admission I will overrule the objection.

Defendants' counsel excepts to the ruling of the master.

The contract offered was marked Exhibit H.

This was all the testimony introduced in the case.

After the close of the case, by agreement of counsel, it was reopened and it was stipulated that the plat, marked Exhibit X, indicating the location of rights of way of St. Louis County railroad through Forest park shall be received as evidence of the locations of the several rights of way as located thereon, and also of
388 the location of Griswold's land, Duncan's subdivision, and that part of the park through which the said railroad ran.

I certify that the foregoing testimony and record of testimony and proceedings before me as master herein are correct.

GEO. H. SHIELDS, *Master.*

September 30, 1886

389 *Master's Final Report. Filed Oct.* 4, 1886.

In the Circuit Court of the United States for the Eastern District of Missouri.

THE CITY OF ST. LOUIS, ST. LOUIS, KANSAS City & Colorado R. R. Co., Intervenors in Central Trust Company of N. Y., *et al.*, Complainants,
vs.
WABASH, ST. LOUIS AND PACIFIC R. R. COMPANY *et al.*, Defendants.
} Consolidated Causes. Nos. 2357 and 2464.

To the honorable the circuit court of the United States for the eastern district of Missouri:

This case having been re-referred to the master on the 30th day of July, 1886, by order of his honor Judge Brewer, in chambers, on the 4th day of August, 1886, the intervenors filed an amended bill, and on the 21st day of August, 1886, The Wabash, St. Louis and Pacific Railway Company, The Central Trust Company of New York, James Cheney, trustee, and Solon Humphreys and Thomas E. Tutt, receivers, being all the defendants, filed their joint answer to said bill. Owing to the absence of the master in the East at the time the second reference was made, the case was not set for hear-
390 ing until the 30th day of August, 1886, due notice having been given to all parties. On that day the master was ready to proceed, but, owing to an agreement between the parties, the case was continued until the 7th day of September. Afterwards, by consent of parties, the continuance was set aside and, by consent, the case was set for hearing on the 2nd day of September, 1886. The case was heard from time to time, as counsel agreed, until the 6th day of September, and was set down for final argument on September 11th. The argument being had, leave was given to the parties to file briefs on or before September 14th, at which time briefs were filed by counsel for both sides and the case submitted, the particulars of all which will appear in the transcript of testimony herewith returned.

The amended petition is substantially the same as the original petition, some of the averments being made more specific, and the additional averment that "on the 24th day of December, 1878, the St. Louis, Kansas City and Northern railroad became the owner by deed of all the remaining rights, franchises, property, and right of way through said park and to said Eighteenth street, subject to said agreement." The amended petition also avers the acquirement by the railroad companies, through the commissioners of Forest park, of a right of way forty-two feet wide in and upon and through said park in common with and to be held and enjoyed jointly with said St. Louis County Railroad Company and its assigns on the terms of said contract between them, and which right of way was that right of way then and there established by said tripartite agreement

as the sole and final right of way for said companies through said park.

By the answer and stipulations many of the averments of the
391 petition are admitted, but the construction of the contracts and deeds contended for by the intervenors is denied, and the answer then sets up affirmatively that prior to the passage of any law establishing Forest park, on the first day of November, 1871, the St. Louis County Railroad Company, being then a corporation, acquired from one W. D. Griswold a right of way forty feet wide through a tract of land then owned by him, which afterwards became a part of Forest park; that in an act of March 25th, 1874, establishing Forest park there was a proviso that "nothing in said act should prevent the St. Louis County railroad from using and occupying a right of way of the width of not more than seventy feet through the northeast portion of said Forest park," etc., setting forth the proviso in the third section of said act. The answer then sets out the contract between the St. Louis, Kansas City and Northern Railroad Company and the St. Louis County Railroad Company and the tripartite contract between the same parties and the board of Forest park commissioners, and denies that those contracts bear the construction contended for by the intervenors—particularly denied that the ninth section of the tripartite agreement is binding on the Wabash railroad, and avers that it is the personal covenant of the St. Louis County Railroad Company and only related to such right of way as was retained by the St. Louis County Railroad Company; that it was not attached to any grant made by said county railroad company; that it did not bind the grantees or assignees of said county railroad company or any real estate or right of way conveyed by it to the St. Louis, Kansas City and Northern
392 Railroad Company. The answer also denies that the Wabash holds or enjoys all or any portion of the right of way between Union avenue and the Union depot under any agreement with any person or party requiring them to permit other railroads or railroad companies to use the same, and avers that it now holds the right of way through the park by and through grants from one W. D. Griswold and the State of Missouri to said St. Louis County Railroad Company, free and unincumbered with any condition, easement, or license from any source, and deny that, except as in said answer stated, it holds said right of way or any part thereof under the agreements and deeds of August 11th, 1875.

The answer also denies that there was any consideration for the tripartite contract, because the park commissioners had no power to grant or give said railroad company anything for a consideration for such covenant, and denies that the tripartite contract was duly recorded. The answer puts the defendants' construction upon the contracts; admits the consolidation of the St. Louis, Kansas City and Northern Railway Company with the Wabash Railway Company, and that by virtue of the statute in such cases made and provided "it became seized and possessed of the railroad, real estate, etc., previously owned by the St. Louis, Kansas City and Northern Railroad Company." The answer further sets up that afterwards, on the 1st day of June, 1880, the Wabash railroad issued its negotiable bonds

and conveyed all of its railroads, real estate, and rights of way, including the right of way in controversy, to the Central Trust Company and James Cheney, trustees, to secure said bonds; that through a default on the bonds there was an appointment of receivers,
393 and that the receivers are now in possession of said property under said mortgage; that neither the bondholders, trustees, nor the receivers are privy to or bound by any agreement made by the St. Louis County Railroad Company and said park commissioners in respect to this right of way through said park or elsewhere by other railroads.

That there was no privity of contract or privity of estate between the petitioners and the defendants to the right of way in controversy; that the ninth section of the tripartite agreement was not binding on the defendants, because it provided for the use of the right of way on such terms "as may be agreed upon between it and other railroads desiring the use thereof," and that it would be inequitable to substitute the judgment of the court for the judgment of the parties, and because there never was any mutuality of obligation between the St. Louis County railroad and other railroads desiring to use said right of way.

A general replication to this was filed denying the facts set up in answer, on which pleadings, exhibits, and evidence the case was submitted.

As the functions of the master in this case are practically advisory in their nature, it will perhaps aid the court to give a brief history of the connection of the parties with this right of way in controversy, as shown by the evidence.

In 1871 W. D. Griswold owned property known as the Cabanne dairy farm, between King's highway and Union avenue, part of which land south of Lindell avenue extended afterwards became part of Forest park. On the 21st day of November, 1871, by an instrument of writing, under seal, which was proved by the
394 attesting witnesses and filed and recorded in the recorder's office of St. Louis county December 5th, 1871, said Griswold consented that the St. Louis County railroad might "locate, construct, and maintain its railroad across and over said land" "on a right of way forty feet in width, the center line of which begins on King's highway twenty feet north of the southeast corner of said land conveyed (*i. e.*, the land conveyed by him), and running along parallel to the south line thereof eight hundred and twenty-five (825) feet, and thence, by a curve eleven hundred and seventy (1,170) feet long, bearing northwest with a radius nineteen hundred and three (1,903) feet; thence, by a line bearing north fifty-five (55) degrees west, about ten hundred and ninety (1,090) feet to a point on Union avenue not less than four hundred and eighty-seven (487) feet south of the northeast corner of Robert Forsyth's land" (for the location of this line see Exhibit "X"); "and the right of way hereby granted to said railway company shall be forty (40) feet in width through said land, for the location, construction, and maintenance of its railroad and for that use and purpose only, this license to operate in perpetuity if the St. Louis County Railway Company, its

successors and assigns, shall continue to operate and maintain their railroad and to cease with their non-use of the same for such purposes. The said instrument further declares that the license was granted subject to the condition "that the road should be built, maintained, and operated and that they should make good fences on each side of the railroad," etc. It also gave consent that the toe of the embankment might run over on the adjoining land, and that the slope of the cut might also extend over his land, as might be necessary or convenient."

395 On the 25th day of March, 1872, the General Assembly of the State of Missouri passed an act entitled "An act to establish Forest park" (Session Acts Mo., 1872, p. 255), which park included part of this land of Griswold's. Section five of said act put said park under the exclusive control and government of a board of commissioners and conferred upon said board very general authority to do what was necessary to carry out the true manner and intent of the act.

On the 29th day of October, 1872, an agreement was entered into between the Forest park commissioners and the St. Louis County Railroad Company by which the Forest park commissioners granted and agreed to convey or cause to be conveyed to the said railroad company a free right of way seventy (70) feet wide through said Forest park, according to the blue line on a map accompanying this agreement, being the same designated and agreed upon by John Withnell, Joseph O'Neill, and W. W. Leffingwell, on behalf of said commissioners, and W. Marsh Kosson, on behalf of said railroad company.

In consideration of $1.00 and the covenants in said agreement to be performed by the parties of the first part "the railroad company hereby relinquish and shall cause to be conveyed to said park commissioners that portion of the right of way heretofore obtained by them from W. D. Griswold within the limits of the said park" (see Exhibit "X"). The agreement then provided for the manner in which the railroad company shall construct its railroad, which it agreed to complete on or before the first day of January, 1874, and to extend their track to Eighteenth street, in St. Louis, within two years. The park commissioners agreed to grant for depot

396 purposes a place 700 feet in length by 100, including the seventy-foot right of way. The railroad company agreed to pay to the park commissioners one cent on every fare collected on visitors to and from St. Louis and said park depot and one and one-half cents on every round trip ticket between the same points. The park commissioners out of this sum agreed to pay the railway company twenty-five thousand dollars ($25,000.00) as a consideration for the tunneling and extra grading required by the agreement, and also agreed to exact the same toll from other railroads and conveyances carrying passengers for hire from St. Louis to the park. The park commissioners retained the right to change at their expense the grade and right of way of said railroad at any time through the park on certain conditions, and the railroad company agreed to make regulations as to running of the cars, etc., as might be neces-

sary for the safety of the passengers, and agreed to enjoy the privileges granted them in such manner as not to mar, injure, or destroy the purpose for which said park was established. The railroad company was given full power as to running trains, etc., and the park commissioners reserved general jurisdiction for police and park purposes over the same as over other portions of the park. This agreement was acknowledged on the 5th day of December, 1872, by the president and secretary of the park commissioners and the president and secretary of the St. Louis County Railroad Company, and was produced by the present park commissioner of the city of St. Louis as being turned over to him by the park commissioners,
397 with other papers, records, etc., when the board was abolished by the adoption of what is known as the "scheme and charter," in 1876.

The agreement was recorded December 5th, 1872. The St. Louis, Kansas City and Northern Railroad Company had actual notice of the same, as will be seen by the testimony of Col. Blodgett, on cross-examination by Mr. Orrick (p. 33), he saying that "during the negotiations which led up to the agreements of August 11th, 1875, between the St. Louis County railroad and the St. Louis, Kansas City and Northern railroad, and also the tripartite agreement between the same parties and the commissioners of Forest park" (in which negotiations he represented the St. Louis, Kansas City and Northern Railroad Company), "that this contract" (of October 29th, 1872) "was mentioned." Col. Blodgett said (p. 33), "I cannot say that there was anything said about that contract, except merely that there was or had been such an instrument. I don't recollect that it was considered as cutting any important figure. I merely recollect that in talking about the situation it was mentioned, and that is all I recollect. I had forgotten it until the other day, when it was mentioned here."

At the October term of the supreme court of the State of Missouri this first act establishing Forest park was held unconstitutional and void, for the reasons that it was not established for municipal purposes within the meaning of sec. 4, art. 3, of the State constitution, and that it authorized a special tax for the purpose of a general public character. (See State *ex rel.* Chouteau *vs.* Leffingwell, 54 Mo., 453.)

On account of this act being declared void the counsel for
398 the defendants insisted that neither it nor the agreement just referred to was competent evidence. I overruled the objection and admitted the act of 1872 and also the contract as relating to transactions between the St. Louis County Railroad Company and the *de facto* board of park commissioners and as explaining the proviso in the second act establishing Forest park pleaded by both sides.

The plat in evidence (Exhibit "X") shows the extent of the differences there were between the right of way as conveyed by the Griswold deed and the right of way as established by the contract of October 29th, 1872, between the commissioners of Forest park and the St. Louis County railroad. It is very evident, from an in-

spection of the plat attached to and a part of this latter agreement and of plat marked Exhibit "X," that the right of way of seventy feet conveyed to the St. Louis County railroad in lieu of the Griswold right of way relinquished by said railroad company was not the same line as that described in the Griswold deed. The Griswold line, beginning at King's highway, "is a straight line for eight hundred and twenty-five (825) feet, thence by a curved line eleven hundred and seventy (1,170) feet long, bearing northeast with a radius of nineteen hundred and three (1,903) feet, and thence by a line bearing north fifty-five (55) degrees west about ten hundred and ninety (1,090) feet to a point on Union avenue," etc., whereas the line as shown by the plat attached to the agreement of the 29th day of October, 1872, and the plat marked Exhibit "X" is an entirely different line, entering the park through Duncan's subdivision and much further south than the Griswold line, and running through the park on a series of curves and entering Gris-
399 wold's land several hundred feet west of King's highway. (See the lines as indicated on plat marked Exhibit "X.")

On the 25th day of March, 1874, the General Assembly of the State of Missouri passed a second act establishing Forest park (see Session Acts Mo., 1874, p. 371). This act omitted the objectionable features of the act of 1872 and provided that the property within the park limits should be condemned, and also that when the same should be paid for that the title should vest in the people of the county. In section third, which provided for the vesting of the property in the people of the county by general condemnation proceedings, is inserted this proviso: "Provided, that nothing in this act shall prevent the St. Louis County railroad from using and occupying a right of way of the width of not more than seventy feet through the northeastern portion of said Forest park. The said railroad shall only enter the park through Duncan's subdivision, on the east side of said park, and, running westwardly on the northern side of the River Des Peres, shall pass out of said park at a point on the northern line thereof east of Union avenue; and provided further, that no switch or siding shall be constructed by said railroad company in said park, nor shall more than one depot be established in said park, and that shall be for passengers only; and provided further, that the grade of said railroad, as far as the same runs through Forest park, shall be approved by said Forest park commissioners." This is clearly legislative recognition of the agreement between the old board of Forest park commissioners and the St. Louis County railroad made the 29th day of October, 1872. The right of way obtained by said railroad from the old board of
400 park commissioners was seventy feet in width. It entered the park through Duncan's subdivision, on the east side of the park. It ran westwardly on the northern side of the River Des Peres and passed out of the park at a point on the northern line of Union avenue east of Union avenue, as will be seen by an examination of the plat attached to and a part of said agreement and plat, marked Exhibit "X." It cannot be a legislative recognition of the Griswold line, because that line is not seventy but forty feet wide.

It did not enter the park through Duncan's subdivision, but at King's highway, twenty feet north of the southeast corner of the Cabanne dairy farm, much farther north than Duncan's subdivision. The proviso in the act did not establish a definite right of way of seventy feet on the exact line as granted by the old board of Forest park commissioners, but it recognized an acquired right of way in the St. Louis County Railroad Company and excepted that from any construction of the act which might endanger it, and in describing the land substantially followed the line as granted by the old board of Forest park commissioners, not the line as granted by Griswold.

This was the state of the case in regard to the right of way through the park on the 11th day of August, 1875, when the agreement between the St. Louis County railroad and the St. Louis, Kansas City and Northern Railroad Company and the tripartite agreement between the same parties and the board of Forest park commissioners and the deed from the St. Louis County Railroad Company to the St. Louis, Kansas City and Northern Railroad Company were made.

In the agreement of August 11th, 1875, between the St. Louis
401 County Railroad Company and the St. Louis, Kansas City and Northern Railroad Company and the commissioners of Forest park, the Forest park commissioners, in consideration of the relinquishments, agreements, and stipulations hereinafter contained on the part of said party of the second part, do hereby accept and improve the line and grade of said railroad as laid down and described upon the accompanying plat and profile hereto attached and forming a part of this agreement, and said line and grade, in case there is not forfeiture of this agreement, is hereby fixed as the sole and final established right of way to which said party of the second part is entitled, by statute or otherwise, through said park or any part thereof, and the width of said right of way as established by statute is hereby reduced from seventy feet and fixed at forty-two feet between its outer points, etc. In the second paragraph of this agreement the St. Louis County railroad, in consideration of foregoing agreements on the part of the park commissioners, "does hereby relinquish twenty-eight feet off the seventy feet established by statute for its right of way through Forest park, except in case of forfeiture of this agreement, and provided that in case the right of way herein described and established shall not be promptly placed at the disposal and to the use of said railroad, party of the second part, or its assigns, or in case of any unreasonable delay or hindrance on the part of said park commissioners in regard to placing said party of the second part or its assigns in possession of said right of way under the terms and conditions of this agreement, then in such cases," etc., the agreement should be forfeited and the parties should be restored to all their rights as if it had never been made.

402 It must be observed that the park commissioners, in consideration of this relinquishment and the agreements and stipulations in the contract, accept and approve the line of the railroad, and that the width of said right of way was fixed at forty-

two feet between its outer points, which is a different width from that acquired originally from Griswold (which was forty feet) and a different width also from that conceded to the St. Louis County railroad by the first board of Forest park commissioners and recognized by the proviso to section three in the second Forest park act (which was 70 feet). It must be further observed that the tripartite agreement expressly refers to this seventy feet right of way as "being established by statute." It can hardly be asserted that the Legislature, by the proviso to the third section of the Forest park act of 1874, granted a right of way of seventy feet through the park. It certainly recognized such right of way, but the source of the right of way of seventy feet was the contract between the old board of park commissioners and the St. Louis County railroad of October 29, 1872. The St. Louis County railroad was asserting its right to seventy feet, not to forty feet; it relinquished twenty-eight feet by the tripartite agreement, not from forty feet, but from seventy feet, and could only have referred to that right obtained from the old board of park commissioners and not to that obtained from Griswold. Evidently its contention was that the recognition of a right of way of seventy feet by the Legislature was a validation of the action of the old board, although the act under which the board assumed to act was void; and it carefully preserved its rights if from any cause the tripartite agreement should fail to be car-
403 ried into effect. By the tripartite agreement the railroad companies obtained a grant from the Forest park commissioners of a new line forty-two feet wide, and differing from both the Griswold line and the line as established by the old board (see plat marked Exhibit "X"), and an approval of the line and grade of the road and other valuable concessions. The St. Louis, Kansas City & Northern railroad was a party to this contract for itself and took its rights under it, and afterwards acquired the rights of the St. Louis County railroad by forfeiture under this agreement and the agreement of August 11th, 1875, between the two companies.

It is evident to my mind that those contracts between the two railroads and between the two railroads and the board of Forest park commissioners was the final adjustment of disputed questions between the parties, so far as the right of way through the park was concerned. In the contract between the two roads this provision appears: "Whereas it is desirable and intended to have an amicable adjustment of all differences and conflicting claims and rights;" and the twelfth section of the tripartite agreement provides: "And whereas, for the purpose of enabling the party of the third part to reach the Union depot at St. Louis, Missouri, an amicable arrangement and agreement for the right of way outside of and through said Forest park has been made and entered into by and between the parties of the second and third parts;" "and whereas the party of the third part, in further pursuance of said last-named agreement, is about to construct and maintain a railroad in, upon, and through said park:" "Now, therefore, in view of the premises and as an inducement to said party of the third part to proceed as
404 intended, the party of the first part, the board of park com-

missioners, does hereby grant and convey unto and license and permit the said party of the third part (the St. Louis, Kansas City & Northern railroad), its successors and assigns, to have, hold, use, and enjoy said right of way in, upon, and through said park in common with and to be held and enjoyed jointly with said party of the second part and its assigns," etc. It is evident to my mind that the St. Louis, Kansas City and Northern Railroad Company and the St. Louis County Railroad Company and the board of Forest park commissioners all regarded the tripartite agreement as being a grant and the establishment for the first time of a definite right of way through the park by the legal board of Forest park commissioners, and that such agreement was necessary in order that the roads should enjoy the same. This view is strengthened by the terms of the deed of August 11th, 1875, to the St. Louis, Kansas City and Northern railroad from the St. Louis County railroad. It refers to the Griswold deed when conveying the right of way north of the park, but when conveying the right of way through the park it says: "An undivided one-half of all the right, title, and interest of the party of the first part of, in, and to the right of way and of, in, and to any and all other rights, privileges, and franchises, powers, and immunities owned by or vested in or enjoyed by or that may be hereafter acquired or owned by, vested in, or enjoyed by the party of the first part in, through, or upon Forest park by any means or from any source whatever;" not simply those rights acquired by the Griswold deed, but those acquired by any means and from all sources.

I have carefully reconsidered, in the light of the addi-
405 tional averments and additional testimony, the construction given by me in my first report herein as to the legal effect of these contracts and deeds, and I am confirmed in my opinion as then expressed, and I respectfully refer to the same as part of this report without restating the same.

The answer of the defendants admits that the St. Louis County Railroad Company failed to live up to its agreement and the tripartite agreement, and that the said St. Louis, Kansas City and Northern Railroad Company, in accordance with the terms of the aforesaid agreement, "entered upon the sole and absolute possession and enjoyment of all said rights, privileges, franchises, powers, immunities, improvements, and property to the exclusion of the said St. Louis County railroad, its successors and assigns," and that afterwards the Wabash Railway Company, by virtue of its consolidation with the St. Louis, Kansas City and Northern Railroad Company, became seized and possessed of all the aforesaid real estate, railroads, and property previously owned or possessed by said St. Louis, Kansas City and Northern Railroad Company.

There can be little doubt that if the St. Louis County railroad had built its railroad on the portion of the right of way retained by it that it would have been bound by its covenants in the ninth section of the tripartite agreement. By the twelfth article of that agreement the St. Louis, Kansas City and Northern railroad specially covenanted as follows: "Or in case said party of the second part

(the St. Louis County railroad), its successors or assigns, should forfeit its said rights, privileges, and franchises in, upon, and
406 through said park or from any cause cease to have, maintain, or enjoy the same, then it is hereby agreed and covenanted that the party of the third part (the St. Louis, Kansas City and Northern railroad) shall not also be excluded from said park, but shall, with its successors and assigns, continue to have, maintain, and enjoy all its said rights, privileges, immunities, franchises, improvements, and property on the terms hereinbefore set forth continuously and forever," thus expressly covenanting that it should enjoy the privileges, etc., under the limitations, without exception, set out in the contract.

Even in the absence of such a stipulation, I am of the opinion that when the St. Louis, Kansas City & Northern Railroad Company, as averred in the answer of the defendants, "in accordance with the terms of the agreement aforesaid, entered upon the sole and absolute possession and enjoyment of all said rights, privileges, franchises, powers, immunities, improvements, and property to the exclusion of the St. Louis County railroad, its successors and assigns," by reason of forfeiture, that it could only take such privileges, immunities, etc., subject to the conditions under which they were held by the St. Louis County railroad.

I respectfully refer the court to my original report herein supporting this view.

The amended bill avers that on the 24th day of December, 1873, the St. Louis, Kansas City and Northern railroad purchased and became owner by deeds of all the remaining rights, franchises, property, and right of way formerly held or owned by the St. Louis County railroad through said park and to said Eighteenth
407 street, subject to said agreements. This is practically denied by the answer, although the denial, perhaps, goes no further than to deny that the conveyance was subject to said agreement.

The evidence shows that on the first day of October, 1875, the St. Louis County Railroad Company made its deed of trust to Rufus J. Lackland and Gerald B. Allen, as trustees, to secure three hundred thousand dollars ($300,000.00) of bonds, due in thirty years, with interest at seven per cent., whereby it mortgaged all its property and franchises not before conveyed to the St. Louis, Kansas City and Northern railroad. This deed was recorded October 9th, 1875. On the 8th day of June, 1877, the said trustees sold the road under the deed of trust and conveyed it to Charles Miller. This deed was recorded June 8th, 1877, and by mesne conveyances the said property was conveyed on the 4th day of December, 1878, to the St. Louis, Kansas City and Northern Railroad Company. This deed was recorded on the 27th day of December, 1878. On the 5th day of December, 1878, the sheriff of St. Louis county sold, under execution on two judgments rendered on the 15th day of October, 1877, against the St. Louis County Railroad Company, certain portions of the property of the St. Louis County railroad, and the same was afterwards conveyed by mesne conveyances to the St. Louis, Kansas City and Northern Railroad Company, so that before the consolida-

tion of the Wabash practically all of the property and franchises of the St. Louis County railroad had passed to the St. Louis, Kansas City and Northern Railroad Company, and when the Wabash railroad succeeded to the rights, etc., of the St. Louis, Kansas City
408 and Northern railroad by virtue of the consolidation it claimed title to all the property of the St. Louis County railroad, first by virtue of the deed from the St. Louis County Railroad Company and the two agreements of August 11th, 1875, and second by forfeiture under the said agreements on account of the failure of the St. Louis County railroad to pay its proportion of the expense of constructing the road, and third by and through the subsequent deed of October 1st, 1875, to Lackland and Allen and the sheriff's deed under the judgment of October 15, 1877.

Before this bill was filed, on the 1st day of June, 1880, the Wabash Railroad Company made its mortgage to the Central Trust Company and to James Cheney, trustees, of all this property to secure certain negotiable bonds described in the answer, under which the receivers herein were appointed by this honorable court.

The counsel for the receivers claim that the mortgagees take as an assignee; that there was no notice to the trust company or to Cheney of the tripartite agreement, and that there is no privity of contract or privity of estate between the petitioners and defendants in regard to any of said property.

The tripartite agreement, although executed by the respective parties under seal, was never acknowledged. It was filed for record and recorded September 5th, 1879, before the mortgage of the Wabash was executed to the Central Trust Company and James Cheney, but after the deed of trust by the St. Louis County Railroad Company, dated October 1st, 1875, to Lackland and Allen, trustees. Under the statutes of the State of Missouri the tripartite agreement was not entitled to record. (Revised Stat. Mo., 1879, secs. 676, 681, 691.)

409 The supreme court of the State of Missouri, in the case of Bishop *vs.* Schneider (46 Mo., 472), held that a deed not acknowledged or improperly acknowledged, although recorded, will not be constructive notice to any one. The counsel for the receivers therefore claim that the defendants herein occupy the position of purchasers without notice. I do not agree with counsel in this claim. Under the Missouri registry laws a conveyance unrecorded is good and passes title as against the grantor, his heirs and devisees, and is void only against subsequent purchasers and mortgagees without actual notice from the same grantors whose deeds were first recorded.

McCammant *vs.* Patterson, 39 Mo., 110.
Cockrell *vs.* Maguire, 10 Mo., 89.

Such deed is good as between the parties or those purchasing with actual notice.

Stevens *vs.* Hampton, 46 Mo., 404.

Whenever the state of the title on the record would lead a searcher

of incumbrances who is using common prudence and care in investigating the title to the knowledge of a fact, the law assumes that he acquires knowledge of it.

Dignan *vs.* Colemen, 47 Mo., 375.
Levy *vs.* Wolf, 10 Ohio, 35.

The record of a deed which was so defectively acknowledged as to not impart constructive notice would yet constitute actual notice to any parties who actually saw the record.
410 Musick *vs.* Berry, 49 Mo., 458.

Where a purchaser is put on inquiry he is to be deemed as purchasing with notice.

Stevens *vs.* Smith, 7 Mo., 610.
Marne *vs.* McLean, 13 Mo., 298.
Speck *vs.* Wiggan, 40 Mo., 405.
Mawpins *vs.* Emmons, 47 Mo., 304.
Mean *vs.* Blaine, 80 Mo., 184.
Widdecomb *vs.* Childress, 84 Mo., 383.

Under the circumstances of this case there can be no doubt that the defendants are charged with notice of the tripartite agreement, as they are presumed by law to take notice of whatever was properly on the record. They certainly derived title to part of this property through the park under the deed of August 11th, 1875, from the St. Louis County railroad to the St. Louis, Kansas City and Northern Railroad Company. This deed was recorded August 13th, 1875, long before the mortgage to the defendants and before the mortgage of the St. Louis County railroad to Lackland and Allen, dated Oct. 1st, 1875. This deed recites "that it was made in pursuance of the terms of a certain contract made and executed by and between the parties of the first part and second part hereto, dated August 11th, A. D. 1875, and in full satisfaction of so much of said contract as relates to the conveyance of certain pieces of land and rights of way to said party of the second part." This deed also recites: "All of which conveyances of the said rights of way in this deed
411 mentioned are made subject to the terms and conditions upon which the same are granted to the party of the first part." These recitals certainly put all parties on inquiry. When they examined the contract of August 11th, 1875, between the two railroads they found a reference to the tripartite agreement as follows: "And whereas — this agreement and a certain agreement between the parties hereto and the commissioners of Forest park, of even date herewith, the party of the second part is about to, and hereby, in consideration of the covenants and agreements of the party of the first part hereinafter specially set forth and of the covenants and agreements of said commissioners of Forest park in said agreement with them contained, does, covenant and agree to construct and maintain a railroad bed and road in, upon, and through said Forest park and the tunnel and cut hereinbefore specified, according to certain plans and specifications agreed upon and according to the terms and conditions of said agreement with said com-

missioners for the joint use of both the parties of the first part and the second part hereto, their several successors and assigns," etc., etc.

This deed is a necessary link in the chain of title through which the mortgagees claim. It refers as a part of said deed to the agreement between the two railroads, and this agreement refers to and makes a part of it the tripartite agreement of the same date. There can be no question under these facts and Missouri decisions that not only the mortgagees under the mortgage of December 1st, 1880, but the mortgagee under the mortgage of October 1st, 1875, are chargeable with notice of the tripartite contract.

412 I am also of the opinion that the clause "all of which conveyances of the said rights of way in this deed mentioned are made subject to the terms and conditions upon which the same are granted to the party of the first part" would be sufficient to put all parties on inquiry as to the terms of the tripartite contract under which the St. Louis county railroad claimed its right of way through the park. The Griswold deed was on record. The contract between the old board of Forest park commissioners and the St. Louis county railroad was on record. The act of 1874 creating the new board was a public act with its provisions as to the seventy feet right of way through the park, and all this before any of the mortgages or judgments through which the defendants claim were executed. The defendants must be held chargeable with notice of all the covenants of the tripartite contract.

The counsel for the receivers contend that the defendants are not bound by the ninth article of the tripartite agreement, as assignees of the original parties, because the covenant is personal and does not run with the land, and cites in support of this, among other cases, Norcross *vs.* James, American Law Register, 1886, p. 64. The facts are as follows: One Kibby conveyed to Flint a quarry of six acres, bounded by other land of Kibby's, covenanting for himself, his heirs, administrators, and executors, with Flint, his heirs and assigns, that he was seized in fee, etc., "and that I will not open or work or allow any person or persons to open and work any quarry or quarries in my farm or premises in said long meadow."

413 By mesne conveyances plaintiffs bought Flint's quarry and defendants the surrounding land. Defendants opened another quarry on their land, and plaintiffs brought suit by injunction to restrain them. The court held that the covenant could not be enforced against the assignees of the grantor who made the covenant, putting this decision on the ground that the covenant does not touch and concern and extend to the support of the thing conveyed, citing 5 Coke's Reports, 16; and, further, that it was not for the benefit of the estate conveyed, citing Cockson *vs.* Cock (6ro. Jac., 125). The court says the scope of the covenant and the circumstances show that it is not directed to the quiet enjoyment of the dominant land. It also intimates that being a covenant for a monopoly it is invalid, but declined to decide that question. The court, however, uses this language: "On the other hand, if the rights in question were of the class to which commons belonged and of which easements are the most conspicuous type, these rights,

whether created by prescription, grant, or covenant, when once acquired, were attached to the land, and went with it, irrespective of privity, into all hands, even those of a disseizor (page 66).

"When it is said in this class of cases that there must be a privity of estate between the covenantor and covenantee, it only means that the covenant must impose such a burden on the land of the covenantor as to be in substance or to carry with it a grant of an easement or *quasi* easement, or must be in aid of such a grant, which is generally true, although, as has been shown, not invariably (Packenham's case), and although not quite reconcilable with all the old cases except by somewhat hypothetical explanation" (p. 67).

414 The receivers' counsel also cite Harsha *vs.* Reid (45 N. Y., 415), where the court decides, on the authority of Keppler *vs.* Bailey (2 Myl. & K., 517), that "a covenant by an owner of land not to permit a grist-mill to be erected thereon is not a covenant running with the land, charging an unnamed assignee. It is a personal contract binding only the covenantors and their personal representatives. It granted no interest in the premises and created no charge thereon. An action will lie against no one but the covenantor for a breach of this covenant, and a subsequent grantee of the lands will not be liable upon it."

He cites also Keppler *vs.* Bailey (2 Myl. and K., 517). This was a case where, under an act of Parliament, a canal company was authorized to construct auxiliary railroads, certain land-owners and lessees of the Beaufort Works formed a joint-stock company to construct a road to the Trevil quarry. In the partnership deed of the railroad company the lessees of the Beaufort Works covenanted for themselves and heirs, executors, administrators, and assigns, with the shareholders, their heirs and assigns, to procure all limestone used in such works from the Trevil quarry and to carry all such limestone and also all the ironstone from the mines to such works along the Trevil road and pay a toll of five pence a ton per mile for the same. A bill to enforce this covenant against a person who purchased the Beaufort Works with notice of this partnership was filed, and it was held that the covenant did not run with the land so as to bind assignees at law, and that equity would not enforce it. The court held that the agreement was a fraud on the public, and then proceeds to hold that the covenant does not run with the land.

In the case cited and in the argument in the opinion the
415 court recognizes the principle of an easement in adjoining land being a charge running with the land.

In the case of Tulk *vs.* Maxhoy (2 Phil., 774) Lord Cottingham held that a covenant made by the purchaser of land that he and his assigns would use or abstain from using the land in a particular way may be enforced in equity against all purchasers with notice of the covenant without reference to the question whether such covenant ran with the land or not.

Smith's Leading Cases, 8th American edition, in notes to Spencer's case, vol. 1, p. 167, says: "The doctrine of Tulk *vs.* Maxhoy has been followed and extended in subsequent cases, and Keppler

vs. Bailey must now be considered as overruled, so far as it ignores the effect of taking with notice of a restrictive covenant," citing Luker *vs.* Dennis, 7 Ch. D., 227; S. C., 47; L. J. Ch., 174.

In the case of Bromson *vs.* Coffin (108 Mass., 175), which was distinguished in the case of Norcross *vs.* James, cited by counsel for the receivers, a covenant to build a fence on a railroad, contained in a deed granting to the road a strip for right of way, was held to be an incumbrance on all the remaining land of the grantee and ran with the land on the ground, among others, that the covenant gave the grantee an interest in the nature of an easement in the adjoining land of the grantee, and ran with the land and constituted an incumbrance within the meaning of the covenant against incumbrances in a subsequent deed thereof. The defense was that it was a personal covenant and not binding on the assignees. Gray, justice, says, on page 180, "An interest in the nature of an easement in the land which the covenant purports to *be* bind, whether already
416 existing or created by the very deed which contains the covenant, constitutes a sufficient privity of estate to make the burden of a covenant to do certain acts upon the land for the support and protection of that interest, and the beneficial use and enjoyment of the land granted run with the land charged, and an obligation duly expressed that the structures upon one parcel of the land shall forever be a certain character for the benefit of an adjoining parcel is equally a charge upon the first parcel whether the obligation is affirmative or merely restrictive, and whether the affirmative acts necessary to carry the obligation into effect are to be done by the owner of the one or the owner of the other."

It has been held that even where a covenant does not run with the land it will still confer an equitable right in the covenantee which will be enforced against the subsequent purchaser with notice, and which must exist if the instrument containing the covenant is a link in the chain through which he derives title.

Van Dusen *vs.* Robes, 16 N. J. Eq., 256.
Kirkpatrick *vs.* Pashine, 24 N. J. Eq., 206.
Atlantic Dock Co. — Leavitt, 54 N. Y., 35.

So where the owners of a row of houses covenanted severally with the original owner of the ground not to build in the garden attached to each house, it was held, whether the covenant run with land or not, the purchaser of the houses with notice of the covenant would be bound in equity.

Watson *vs.* McDermott, 2 L. R. Ch. App., 77.

Even if the doctrine contended for by the receivers' counsel that the ninth article of the tripartite agreement was a personal
417 contract of the St. Louis County railroad and did not run with the land were correct, it does not follow that the defendants are not bound by it, as I am of the opinion they had full notice thereof as hereinbefore stated.

I stated in my last report that I did not see the applicability of this doctrine to the case under consideration, for the reason that the

St. Louis, Kansas City and Northern railroad was one of the original contracting parties to the tripartite agreement, and that the Wabash railroad did not take merely as a purchaser or an assignee; that by virtue of the statute of consolidation it took all the property and franchises and assumed all the liabilities, personal or otherwise, of the St. Louis, Kansas City and Northern railroad. While it may be conceded that the mortgagees take as assignees, I am still of the opinion that the doctrine contended for does not apply, for the reason that one of the considerations for the license and grant for the right of way through the park by the park commissioners was a covenant that other roads should be permitted to use said right of way through the park and up to the Union depot. It was in effect saying, "We will give you this right of way through the park if you will consent that it and other property, either now owned by you or about to be condemned for railroad purposes, shall be subject to the right of user of other roads. We require this for the protection of the park and in the interest of the public."

This proposition was accepted and a covenant made that other roads should use the right of way on terms. The legal effect was to create an easement in the property of the two railroad com-
418 panies for the benefit of the public and the park and other roads which want to use the right of way, not only through the park, but over the right of way between the park and the Union depot. Such an easement is a charge upon the land conveyed and runs with the land and binds all other land mentioned in the covenant; but, whether that be so or not, it is in equity enforceable against all persons who take with notice thereof.

Whitney *vs.* Union Railway Co., 11 Gray, 359, 364.
Parker *vs.* Nightingale, 6 Allen, 341, 344.

Counsel for the receivers claim that there is no mutuality in the contract between the St. Louis County railroad and other railroads desiring to use the right of way; that therefore it cannot be specifically enforced. Among other authorities he cites Waterman on Specific Performance, sec. 196, which says: "To entitle a party to a specific performance there must not only be a valid and binding agreement, but, as a rule, the contract at the time it was entered into must be capable of being enforced by either of the parties against the other." In the same section the author says: "The obligation is mutual when both the parties are required by the agreement to do something, the promise of one being a consideration for that of the other."

In sec. 199 the same author says: "If the plaintiff has performed his part of the agreement specific performance may be decreed although the contract, so far as concerns performance by the plaintiff, was beyond the jurisdiction of the court," citing Wilkerson *vs.* Clements, 8 L. R. Ch., 96.

419 In sec. 200 the same author says: "It is well settled that an optional agreement to convey or to renew a lease without any covenant to purchase or accept without any mutuality of remedy will be enforced in equity if it is made upon proper consideration or

forms a part of a lease or other contract between the parties that may be a true consideration for it."

Perkins *vs.* Hadsell, 50 Ills., 216.

"Where a contract consists of several distinct stipulations on one side and a legal consideration is stated on the other it must be considered that the entire contract was in the contemplation of the parties in each particular stipulation and formed one of the inducements therefor, and no one stipulation can be supposed to result from or compensate for the consideration or any part of it exclusive of other stipulations, unless the parties have expressly so declared, and this will be the case whether the consideration be a sum of money to be paid in gross or a specific act to be performed or several sums of money or several acts to be performed."

Stansberry *vs.* Fingree, 11 Gill. & Johnson, 149.

Old Colony R. R. *vs.* Evans, 6 Gray, 25.

The performance of a contract on one side entitles the party performing to equitable assistance against the other, though, upon application of the latter, the court could not have compelled performance in his favor.

Cooper *vs.* Penna., 21 California, 403.

Applying these principles to the case under consideration,
420 we find that the park commissioners granted a right of way through the park to the two railroads, agreed to and did spend large sums of money making improvements, building bridges, etc., in accordance with said contract, and in all respects complied with their covenants in the contract, and the want of mutuality in the contract originally, if it existed, cannot now be set up to defeat the enforcement of the covenant against the defendants. The defendants confessedly enjoy not only the whole right of way, but all of the benefits of the expenditures of the board of Forest park commissioners and of all the other covenants in the tripartite agreement. It is a contract performed on the part of the park commissioners and the city, their legal successor, and the defendants cannot plead want of mutuality successfully after this performance and while enjoying all the benefits of such performance. Since 1875 the St. Louis, Kansas City and Northern railroad and the defendants have enjoyed the rights conferred by the tripartite agreement, not being called upon by the city to permit any other road to use the right of way. When the city appears as an intervenor to enforce the contract for the benefit of another road, in the interest of the preservation of the park and in the interests of the commercial advantages of the city, she is entitled to demand the fulfillment of the contract.

Objection was also made by the defendants' counsel that the contract was of such character that it cannot be specifically enforced, because it would require a series of orders and general superintendence to enforce the performance.

In the case of Wolverhampton Railroad Co. *vs.* The London
421 & New York Railway Company (L. R., 16 Eq., 433) the same point was raised and overruled, and the court granted the injunction restraining the defendants from carrying a portion of traffic by other lines of defendants which ought to have passed over the plaintiffs' line under the contract.

On the authority of this case and of the Singer Sewing Machine Company *vs.* Union Buttonhole Company (1 Holmes, 253) and other cases cited in his opinion, Judge Wallace, in the case of The Chicago & Alton Railroad *vs.* New York, Erie & Western Railroad (22 Am. and Eng. Railway Cases, p. 265), enjoined the diversion of freight from plaintiff's line by the defendant, contrary to contract rights. In this case Judge Wallace quotes approvingly what Judge Lowell said in the Singer Manufacturing case (1 Holmes, 253)—*i. e.*, "that it is now firmly established that the court will often interfere by injunction when it cannot decree specific performance." In a voluminous note to this case the editor of the report says: "The distinction taken in this case between compelling the specific performance of a contract involving a series of acts or continuous acts and granting an injunction to restrain the commission of a series of illegal acts in violation of the contract is well taken and is conclusively established by the authorities."

See Great Northern R'y *vs.* Manchester R'y, 5 De Gef and Sm., 138.

Lathrop *vs.* Junction R'y Co., 4 Fed. Reporter, 41.

Western Union Tel. Co. *vs.* Western R. R., 3 Fed. Rep., 423.

Western U. Tel. Co. *vs.* St. Joe R'y Co., 3 Fed. Rep., 430.

422 I have examined carefully all the cases cited by the counsel for the defendants on these points, and do not see that they militate against the doctrine herein announced. For further information on these points I refer to my original report and authorities therein cited.

On the final hearing additional evidence was offered as to the proper measure of compensation and also as to the value of the real estate occupied by the railroad from the north line of Forest park to Eighteenth street. The testimony as to the value of the real estate does not include the superstructure or terminal facilities occupied by the Wabash, which the testimony of Mr. Talmage shows would be necessarily used if the intervenor had the right to use the Wabash tracks.

After due consideration of this new testimony I am inclined to think that my original valuation of the track and right of way sought to be used was equitable and proper under the circumstances.

There has been additional testimony as to the basis of division, Col. Paramore and Mr. Gays giving as their opinion that the equitable basis in the given hypothetical case in the questions put to them would be the original cost, rather than the present valuation. The witnesses showed no familiarity with cases in which contract rights like the present were involved. I cannot agree with the

counsel for the intervenors and with these witnesses that it would be equitable and just to calculate the interest on the original cost of construction and divide it on a wheelage basis. I therefore adhere to my opinion on this point as expressed in my original report.

423 His honor Judge Brewer, in his order recommitting the case, calls attention to a question that is very difficult to determine—that is, whether the right of user by the intervenors extends simply to the right of way not conveyed by the St. Louis County railroad or to the whole of the right of way, or whether the right extends to the use of the right of way and not to the tracks of the Wabash. The evidence of Col. Emerson (p. 15, original testimony) and Mr. Lincoln (p. 17, final testimony) shows that owing to the present construction of the Wabash road and its side tracks and switches another track on the right of way could not be built throughout the whole distance, although it might be in some parts thereof. The contracts of Aug. 11th, 1875, provide for the joint use of portions of the right of way through the tunnel and cut, and also for laying a third rail at designated points, and provide for regulations for such joint use. In view of these facts and in view of the fact that the pleadings show that the whole of this right of way is merged in the Wabash by forfeiture and by subsequent conveyances, and in view of the fact that the Wabash is so constructed that another track could not be placed thereon, it would seem that equity would require the intervenor to be permitted to use the present tracks.

As to the regulations under which the road should be operated, if the right should be granted by the court, there has been no additional evidence to disturb the recommendation in my first report.

The evidence on final hearing shows that the St. Louis, Kansas City and Colorado railroad has located its route and commenced condemnation proceedings in the St. Louis circuit court to

424 secure its right of way from Forsyth junction to the point where the Wabash road enters the north side of the park. These proceedings appear to be in good faith, and, under the views expressed by Judge Brewer in his opinion herein, entitled that road to an adjudication of its rights in the matter in controversy. Therefore, in view of all the facts and circumstances, I am of the opinion that the intervenors are entitled to relief substantially as prayed for, as herein recommended.

All of which is respectfully submitted.

GEO. H. SHIELDS,
Master pro hac vice.

St. Louis, Mo., October 4th, 1886.

After my draft report herein, as submitted to counsel, and after defendants' counsel had filed exceptions thereto by agreement they amended the pleadings and submitted as additional evidence plat marked Exhibit "X." This necessitated a recasting of portions of the report, which caused the delay in presenting the same. I have carefully considered the exceptions filed by defendants' counsel,

and hereby overrule said exceptions, and have signed the above report.

All of which is respectfully submitted.

GEO. H. SHIELDS,
Master pro hac vice.

A true copy.

GEO. H. SHIELDS,
Master pro hac vice.

425 *Exceptions to Master's Report.*

In the Circuit Court of the United States for the Eastern District of Missouri.

CENTRAL TRUST COMPANY OF NEW YORK *et al.* *vs.* WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*	Consolidated Cause. Nos. 2357 and 2464. In Equity.

In re intervening petition of the St. Louis, Kansas City & Colorado Railroad Company for leave to use the right of way and property of the Wabash, St. Louis & Pacific Railway Company from north line of Forrest park to the Union depot.

Now come the Wabash, St. Louis & Pacific Railway Company—Solon Humphreys and Thomas E. Tutt, receivers of the
426 property and effects of the Wabash, St. Louis & Pacific Railway Company; the Central Trust Company of New York and James Cheney, trustees, and, excepting to the first and second reports filed herein by the Hon. George H. Shields, master *pro hac vice*, for grounds of exception state—

I.

1st. The master erred in finding that upon the contract of August 11th, 1875, between the St. Louis County Railroad Company and the St. Louis, Kansas City and Northern Railway Company; the contract of same date between the commissioners of Forest park, the St. Louis County Railroad Company, and the St. Louis, Kansas City & Northern Railway Company, and the deed of same date executed by the St. Louis County Railroad Company to the St. Louis, Kansas City & Northern Railway Company or any of said instruments, "intervenor (the St. Louis, Kansas City & Colorado Railway Company) is entitled to use the right of way of defendants from the north line of Forest park to Eighteenth street, in the city of St. Louis, under such reasonable regulations and terms as may be agreed upon and upon such terms and for such fair and equitable compensation to be paid to them therefor as may be agreed upon between said parties" or on any terms or conditions whatever.

2d. The master erred in finding that the covenant of the St. Louis County Railroad Company contained in the ninth article of the tripartite agreement of August 11th, 1875, was referred to or con-

templated by the parties to the deed of August 11th, 1875, from the St. Louis County Railroad Company to the St. Louis, Kansas
427 City & Northern Railway Company, and that it was the intention of the parties to said deed that there should be but one right of way for railroads through said park, which should be subject to common use, not only of said two railroad companies, but such other railroads as might afterwards desire to pass through the park, and that to prevent other railroads from attempting to pass through the park and destroy it for the purposes for which it was established the board of park commissioners required, and that the said St. Louis, Kansas City & Northern Railway Company assented to the condition, that it would take its said right of way through the park subject to the right of user by other railroads, not only of its right of way through the park, but up to the terminus of its road in the city of St. Louis.

3d. The master erred in his construction of the said "tripartite agreement," and especially in holding that by reason of anything contained in the 12th article or clause thereof the defendants herein or any of them became bound by the covenant of said county railroad as contained in the ninth article of said "tripartite agreement."

4th. The master erred in finding that by the terms of said tripartite agreement the St. Louis, Kansas City and Northern Railway Company covenanted that in case of forfeiture by the St. Louis County Railroad Company it (the St. Louis, Kansas City and Northern Railway Company) would observe and perform all the conditions and terms imposed by said tripartite agreement upon said St. Louis County Railroad Company, and in holding, as a matter of law, that under said tripartite agreement said St. Louis, Kansas City and Northern Railway Company could only succeed to the rights, privileges, etc., of said St. Louis County Railroad Company
428 subject to all the terms and conditions imposed upon said county railroad company under said agreement.

5th. The master erred in finding that upon all the evidence adduced the St. Louis, Kansas City and Colorado Railroad Company is entitled to use the right of way of defendants from the north line of Forest park to Eighteenth street, in the city of St. Louis, under such reasonable regulations and terms as may be agreed upon and upon such terms and for such fair and equitable compensation to be paid therefor as said parties may agree upon or on any other terms or conditions.

II.

1st. The master erred in holding that the covenant of the St. Louis County Railroad Company contained in the ninth clause or section of said tripartite agreement was binding upon the grantees, successors, or assigns of said St. Louis County Railroad Company, whereas the evidence shows that said covenant was made only by and for said St. Louis County Railroad Company, and that it was not made for or intended to bind the grantees, successors or assigns, of said company.

2d. The master erred in finding that the covenant or condition

of the St. Louis County Railroad Company contained in the ninth article of the tripartite agreement was in effect the creation of an easement for the public and other railroads that might want to use the right of way through the park and into the Union depot and is enforceable against all the defendants herein.

3d. The master erred in holding that the park commissioners conveyed any right of way to the St. Louis County Railroad
429 Company, and that the ninth clause or article of the "tripartite agreement" created an easement for the benefit of the public and other roads that might want to use the right of way through the park and into the Union depot, and that said easement is a charge upon said right of way and runs with the land and binds all other lands mentioned in said covenant.

4. The master erred in holding that the covenant of the St. Louis County Railroad Company with the commissioners of Forest park contained in the ninth clause or section of said tripartite agreement, to the effect that it would "permit, under such reasonable regulations and terms as might be agreed upon, other railroads to use its right of way through the park and up to the terminus of its road in the city of St. Louis upon such terms and for such fair and equitable compensation to be paid to it therefor as might be agreed upon by said companies," was more than a personal contract or covenant of said St. Louis County Railroad Company.

5th. The master erred in finding as a matter of law that the recital in the deed of August 11th, 1875, from the St. Louis County Railroad Company to the St. Louis, Kansas City & Northern Railway Company, "that said conveyance was made in pursuance of the terms of a certain contract made between the parties to said deed dated August 11th, 1875, and in full satisfaction of so much of said contract as related to a conveyance of certain pieces of land and right of way to the party of the second part (the St. Louis, Kansas City & Northern Railway Company) by the party of the first part" (the St. Louis County Railroad Company), was sufficient to put the defendants herein or any of them on inquiry as to the con-
430 tents of the agreement last aforesaid or as to the contents of the agreement of August 11th, 1875, between the commissioners of Forest park, the St. Louis County Railroad Company, and the St. Louis, Kansas City & Northern Railway Company.

6th. The master erred in finding as a matter of law that the recital in the deed from the St. Louis County Railroad Company to the St. Louis, Kansas City & Northern Railway Company, "that all of said conveyances of said rights of way in this deed mentioned were made subject to the terms and conditions upon which the same were granted to the party of the first part," was sufficient to put the defendants herein or any of them on inquiry as to the terms of the agreement of August 11th, 1875, between the commissioners of Forest park, the St. Louis County Railroad Company, and the St. Louis, Kansas City & Northern Railway Company, or as to the terms of the agreement of the same date between said railroad companies.

III.

1st. The master erred in holding that the recording of the deed of the St. Louis County Railroad Company to the St. Louis, Kansas City & Northern Railway Company or that anything contained in said deed was notice to defendants Humphreys and Tutt or to defendants The Central Trust Company of New York or Cheney or either of them of the contents of the agreement made August 11th, 1875, between the St. Louis County Railroad Company and the St. Louis, Kansas City & Northern Railway Company, or of the contents of the agreement of same date between the commissioners of Forest park, the St. Louis County Railroad Company, and the St. Louis, Kansas City & Northern Railway Company.

431 2nd. The master erred in finding, upon the evidence, that defendants, Humphreys and Tutt and The Central Trust Company of New York and James Cheney, had notice of the contents of the agreement of August 11th, 1875, between the commissioners of Forest park, the St. Louis County Railroad Company, and the St. Louis, Kansas City & Northern Railway Company.

3d. The master erred in holding that defendants, Humphreys and Tutt, as receivers, and The Central Trust Company and Cheney, as mortgagees, do not occupy the position of purchasers without notice, and in holding that they are charged with notice of the tripartite agreement and the contents thereof.

IV.

1st. The master erred in finding that the use by defendants of the right of way in question through Forest park or the estate of defendants therein and the right of way of defendants outside said park and between the east line thereof and the Union depot, in the city of St. Louis, which was not acquired through said St. Louis County Railroad Company by deed of August 11, 1875, is dependent upon or subject to the covenants and conditions contained in the "tripartite agreement," and especially the ninth clause or article thereof.

2nd. The master erred in finding that under the act of March 25, 1874, establishing Forest park or under any other law of the State of Missouri the park commissioners had authority to approve the line and grade — the railroad through the park, whereas the third section of said act of March 25, 1874, specifically provides that only

432 the grade of said railroad as far as the same runs through said Forest park should be approved by said park commissioners.

3d. The master erred in holding that the "tripartite" agreement of August 11, 1875, is the source of defendants' title to the right of way through the park, and in holding that said agreement was a link in the chain of defendants' title to said right of way, whereas it is averred in the petition and admitted in the answer that defendants' right of way through said park was acquired long prior to the execution of said contract.

4th. The master erred in holding that the agreement of August

11, 1875, between said railroad companies and the park commissioners is the source of defendants' title to its right of way through the park or a link in the chain of defendants' title to said right of way through the park or elsewhere, because said park commissioners had no legal power or authority to grant or convey any portion of said park to any person or company for any purpose.

5th. The master erred in holding as a matter of law that the commissioners of Forest park created under the act of March 25, 1874, had legal power and authority to grant to the St. Louis County Railroad Company and to the St. Louis, Kansas City & Northern Railway Company or either of them a right of way through Forest park.

6th. The master erred in finding that the St. Louis County Railroad Company obtained any right of way through Forest park by grant from the commissioners of said park.

7th. The master erred in finding that said St. Louis County Railroad Company acquired a right way through Forest park
433 subject to any covenant or condition on its part that it would permit the use of said right of way by other railroads upon such reasonable terms and conditions as might be agreed upon, it being established by the testimony and admitted by the pleadings that said St. Louis County Railroad Company had acquired the right to enter upon and occupy the right of way in question for its railroad through Forest park long anterior to the making of said tripartite agreement of August 11th, 1875, subject only to the approval of the grade thereof by said park commissioners.

8th. The master erred in failing to find, under the pleadings and evidence, that the full and complete title and right of defendants to the right of way through said park, as now used by them, arose from the deed of W. D. Griswold mentioned in the pleadings and reports.

V.

1st. The master erred in finding that the source of title of defendants to the right of way through the park was the agreement of October 29th, 1872, between the county railroad company and the board of park commissioners established under the act of March 25th, 1872.

VI.

1st. The master erred in finding that the full and absolute right of the St. Louis, Kansas City & Northern Railway Company to the right of way through Forest park, to the exclusion of said St. Louis County Railroad Company, its successors and assigns, arose from a forfeiture provided for in said tripartite agreement, whereas the proof shows that said rights were acquired by forfeiture
434 under the provisions of the contract between the St. Louis County Railroad Company and the St. Louis, Kansas City & Northern Railway Company of date August 11th, 1875.

2nd. The master erred in finding that — the entry of the St. Louis, Kansas City & Northern Railway Company into the sole and absolute possession and enjoyment of all the rights, privileges, fran-

chises, powers, immunities, improvements, and property in and through said park, to the exclusion of the St. Louis County Railroad Company, its successors and assigns, as it is and was provided in said tripartite agreement and in the agreement of same date between said railroad companies it might do in case said St. Louis County Railroad Company should fail to pay one-half the cost of the improvements therein mentioned, it (the said St. Louis, Kansas City & Northern Railway Company) took said rights, privileges, franchises, powers, immunities, improvements, and property subject to the terms of said ninth clause or section of said tripartite agreement, and in holding that said ninth clause or section was binding upon the defendants herein or any of them.

VII.

1st. The master erred in finding that, inasmuch as the St. Louis, Kansas City & Northern Railway Company entered into the tripartite agreement of August 11th, 1875, or took possession of a right of way through the park after the execution of said agreement, the defendants herein are estopped or prohibited from asserting title to said right of way from any other source than said agreement.

435

VIII.

1st. The master erred in finding that the act of March 25th, 1874, establishing Forest park was a legislative recognition of the agreement dated October 29th, 1872, between the board of park commissioners named in the act of March 25th, 1872, and the St. Louis County Railroad Company; whereas the proof shows that said agreement is in no way referred to in said act; and, furthermore, that the line of the right of way through said park mentioned in said act of March 25th, 1874, was not required to be the same as that designated in said agreement.

IX.

1st. The master erred in holding that the ninth clause or section of the tripartite agreement of August 11th, 1875, was such a contract as a court of equity would specifically enforce between the parties thereto or for the benefit of intervenors herein, and in holding that there was mutuality of obligation between the parties thereto and in holding that there was mutuality of obligation between intervenors and the defendants herein or any of them.

2nd. The master erred in holding that the city of St. Louis has a right to enforce the provisions of the ninth article of the tripartite agreement for the benefit of other railroads in the interest of the commercial advantages of the city and for the preservation of the park.

3rd. The master erred in holding that, whether the covenant contained in said ninth article of the tripartite agreement was
436 one that run with the land or not, it is enforceable in equity against all persons taking with notice thereof, and particularly against the defendants herein.

X.

1st. The master erred in finding that said petitioner, The St. Louis, Kansas City & Colorado Railroad Company, is such a railroad or corporation as is contemplated in the deeds, contracts, and agreements mentioned in the pleadings and reports herein.

XI.

1st. The master erred in finding that the value of defendants' railroad and right of way through the park and up to Eighteenth street in the city of St. Louis was only one million dollars; whereas the evidence of J. F. How and A. A. Talmage shows the cost and value of the same for railroad purposes to be a million and a half of dollars.

2d. The master erred in finding, upon evidence, that an equitable basis of compensation for the use of defendants' right of way and property from the north line of Forest park up to the terminus of said line at Eighteenth street would be to allow interest on the value of said right of way and tracks at the rate of six per cent. per annum, and by adding to this the actual expenses of repairs and maintenance of right of way and tracks and the operating expenses of the tracks and dividing the whole on a mileage basis, charging each road in proportion to the number of cars and locomotives run over the tracks by each, when the evidence of Messrs. Talmage and How shows the proper and equitable basis of compensation in such
437 cases to be to allow interest at a reasonable rate on the value of the property, to wit, one million five hundred thousand dollars, and charging each of the two companies using the property with one-half the amount thereof, and by then distributing or dividing the actual expenses of repairs and maintenance of right of way and tracks and the operating expenses of the property, upon a wheelage basis, charging each company with such a proportion of the total expenses for operating, maintaining, improving, and repairing said right of way, tracks, and property as the number of its locomotives and cars run over said property may bear to said total expenses.

3d. Because the compensation recommended by the master is insufficient.

4th. Because the master erred in refusing to find that the measure of compensation and mode of ascertaining the same suggested by defendants and supported by testimony of How, Talmage, and other witnesses is proper, equitable, and just.

XII.

1st. The master erred in admitting the testimony of Andrew McKinley as to his construction of the tripartite agreement and in permitting him to state the purposes he had in view, as president of the board of park commissioners, in making the same.

2d. The master erred in admitting the testimony of J. B. Vandine, C. H. Sharman, J. W. Paramore, and other witnesses as to what would, in their opinion, be a fair and equitable compensation

for the use of defendants' right of way through the park and up to the terminus of the line at the Union depot in St. Louis,
438 when it was not shown that any of said witnesses were competent or qualified to testify concerning the subject-matter.

3d. The master erred in admitting the testimony of Pitzman, Grether, Jones, and others as to the value of defendants' right of way and property in question for railroad purposes, because it did not appear that said witnesses were qualified to testify concerning the subject-matter and because their testimony as to the value of said right of way for other than railroad purposes was incompetent and irrelevant.

4th. The master erred in admitting the agreement made October 29th, 1872, between the commissioners of Forest park and the St. Louis County Railroad Company, because the act under which said commissioners were appointed and acted was unconstitutional and void.

5th. The master erred in admitting the tripartite agreement in evidence, as it purported to affect an interest in land and was not acknowledged or proved as required by statute.

6th. The master erred in admitting, against respondents' objections, certain immaterial, incompetent, and irrelevant testimony.

7th. Because the findings of the master are against law and the evidence.

8th. Because the findings of said master are inequitable and unjust.

WELLS H. BLODGETT,
Solicitor for Defendants.

WARWICK HOUGH,
H. S. PRIEST,
ELENEIOUS SMITH,
Of Counsel.

439 EXHIBIT A.

This agreement, made this eleventh day of August, A. D. 1875, by and between the St. Louis County Railroad Company, party of the first part, and the St. Louis, Kansas City and Northern Railway Company, party of the second part, witnesseth:

That the party of the first part, a railroad corporation of Missouri, having acquired the title to or right of way over numerous pieces of land along its route for a railroad, as designated on chart "A," hereto annexed, and the deeds for which are herewith shown to the party of the second part, and the party of the second — being also a railroad corporation of Missouri, and the lines and routes of said companies, as now established, being continuous and connected in this State, and for the purpose of reaching the Union depot at St. Louis, Missouri, and other purposes the party of the second part desiring and requiring a right of way and the real estate necessary to establish and maintain its route thereto forever over a part of the right of way and real estate of the party of the first part, as well as over the lands of others, and having power under the laws to acquire a right of

way along its said established route, either by purchase, condemnation, or otherwise, and along and over the lands of the party of the first part or others and through Forest park, as well as outside thereof;

And whereas it is desirable and intended to have an amicable adjustment of all differences and conflicting claims and rights:

440 Now, therefore, the parties hereto, each for itself, its successors and assigns, do covenant, promise, and agree as follows:

The party of the first part, in consideration of the premises and of the covenants, promises, and agreements of the party of the second part herein contained, does hereby covenant, promise, and agree to grant, bargain, sell, and convey by good and sufficient deed or deeds of general warranty out of each and every tract or parcel of land now held or owned by it, and which tracts of land are designated on said chart "A," a lot twenty-eight (28) feet in width and extending through each of said tracts from the blacksmith shop at the junction of the Olive street road and the old Bonhomme road in St. Louis county to the northern line of Forest park; and also a lot of same width (28 feet), extending through each of said tracts from the eastern line of Forest park to the western limits of the city of St. Louis; and also a lot thirty (30) feet in width, extending through each of said tracts from said city limits to Tayon avenue, in said city of St Louis; and also an undivided one-half of all the right, title, or interest of the party of the first part of, in, or to the right of way and of, in, or to any and all other rights, privileges, and franchises, powers, and immunities owned by or vested in or enjoyed by or that may hereafter be acquired and owned by, vested in, or enjoyed by the party of the first part in, through, or upon Forest park by any means or from any source whatever—

It being understood, however, that where the party of the first part has only the right of way over any of said tracts outside of said park it shall convey by said deed or deeds said right of way,

441 and where said first party has not and does not claim to have a width of land or right of way equal to the width above called for, but some lesser width, it shall convey by said deed or deeds all of said lesser width; but in all cases all the right, title, and interest of said party of the first part as claimed by it shall, to the width of lot herein agreed upon, be conveyed by said deed or deeds to the party of the second part, its successors and assigns, so as to make a regular, continuous, and practicable route, road-bed, and right of way for the party of the second part, so far as the party of the first part is able to grant it and as laid down and marked out on said chart "A," hereto annexed and referred to.

And whereas there is a tunnel and cut to be made by the party of the second part, as contemplated, extending eastwardly from the eastern line of said park, said party of the second part hereby covenants and agrees to let the trains of the party of the first part pass through said tunnel and cut under the same regulations and restrictions as to running and time tables as herein agreed upon concerning trains in said park and elsewhere:

To have and to hold all and singular said lots, rights of way, and

other property unto said party of the second part, its successors and assigns forever, with all the rights, privileges, and franchises, powers, immunities, improvements, and appurtenances thereto belonging or in anywise appertaining.

And with the additional and especial right and privilege to the party of the second part, its successors or assigns, to make all necessary, proper, or usual cuts and fills on the property of the
442 party of the first part, so as to give at least twenty-eight or thirty feet (as the case may be) at grade to the party of the second part for its tracks; and it is fully understood and agreed that this right and privilege to make cuts and fills shall be had and enjoyed by the party of the second part, its successors or assigns, along the whole route, and shall extend not only to the lots above agreed to be conveyed, but to any others it may acquire, and where the party of the first part may have or acquire lands or rights of way or other interests adjacent: Provided, however, That the use and enjoyment of the rights, privileges, and franchises, powers, immunities, improvements, and property in, through, and upon Forest park and in, through, and upon said proposed tunnel and cut adjoining the eastern line of Forest park and under Barnes avenue and to the eastern end of said cut shall and are to be in common and jointly used by the parties hereto, their successors and assigns.

But it is agreed and covenanted that to accommodate the running arrangements of the party of the second part said party of the second part shall have the absolute and sole control of the running, starting, and regulating of the time-tables of and for its own trains; and it is further agreed and covenanted that no train, locomotive, car, or other conveyance of the party of the first part, its successors or assigns, shall be allowed or attempted to be started or run within eight (8) minutes of the time fixed or stated for the starting, coming in, or running of the train or trains of the party of the second part, its successors or assigns; and there shall be twenty minutes'
443 time between the starting and coming in of the trains of the party of the second part, and this matter as to said specified times shall be under the sole control and regulation of the party of the second part; and it is further agreed and covenanted that the party of the first part shall have and maintain the only depot in said park, as far as the parties hereto are concerned, and that said party of the second part shall not have a depot nor stop any of its trains in said park.

And said party of the second part, for and in consideration of the premises and other the covenants, promises, and agreements of the party of the first part herein contained, does hereby covenant, promise, and agree to pay to the party of the first part, its successors and assigns, within sixty days from the delivery and ratification of these presents and the deed or deeds hereinbefore provided for, the sum of one hundred and twenty-five thousand dollars ($125,000) in currency, for which it is to make its notes in sums of five thousand dollars each, at the date and as of the date of said delivery and ratification hereof, reserving the sum of thirty-seven thousand dollars, which sum is to be placed, at said delivery and

ratification, in the hands and possession of John R. Lionberger, of St. Louis, as trustee, who shall therewith pay off the notes and indebtedness of said party of the first part secured by certain deeds of trust of record on portion of the property now owned by the party of the first part, and if anything remains after said payments are made by said trustee he shall pay it over to the party of the first part, its successors or assigns.

And whereas at two certain points or places, to wit, at and from the eastern line of Compton avenue, thence eastward not exceeding two hundred feet, and also at and from the point five hundred and
444 fifty feet west from Tayon avenue, and thence eastward toward Tayon avenue as far only as necessary, where the right of way or property of said party of the first part is narrowest, it may become desirable and necessary to said party of the first part to lay one rail on said property to be conveyed to said party of the second part, it is therefore hereby mutually covenanted and agreed that at said designated places the party of the first part will use the street or streets adjacent thereto if it can legally do so and the grade of said street or streets is suitable and conforms to the grade of the road; but if the streets cannot be so used or should not so conform the party of the second part shall allow the party of the first part to lay and use one rail upon the property of the party of the second part for such distance as is necessary; provided, however, that the placing and running and passing of trains at said places shall be under such regulations as may be mutually agreed upon.

And it is hereby further mutually covenanted, promised, and agreed that neither party shall in any manner, directly or indirectly, interfere with, obstruct, hinder, or compete with the other in acquiring its own property or right of way for a continuous line or route as herein contemplated and on chart "A" marked down, or in having, holding, and enjoying any right of way or property when so acquired; and where proceedings for condemnation or other process or proceedings or negotiations have been commenced by the party of the first part or on its behalf the same shall, as to the width hereby agreed to be conveyed and contemplated to be acquired and enjoyed to and by the second party, be discontinued or prosecuted as the party of the second part, by its president,
445 may in writing direct and within five days thereafter, said second party paying the damages and expenses therefor.

And whereas, under this agreement and a certain agreement between the parties hereto and the commissioners of Forest park of even date herewith, the party of the second part is about to and hereby, in consideration of the covenants and agreements of the party of the first part, hereinafter particularly set forth, and of the covenants and agreements of said commissioners of Forest park in said agreement with them contained, does covenant and agree to construct and maintain a railroad bed and road in, upon, and through said Forest park and the tunnel and cut hereinbefore specified, according to certain plans and specifications agreed upon and according to the terms and conditions of said agreement with said

commissioners, for the joint use of both the parties (of the first part and of the second part) hereto, their several successors and assigns.

And, in consideration of all the premises and as inducement to said party of the second part to proceed with said construction and maintaining, the party of the first part does hereby covenant, promise, and agree to pay to the party of the second part, its successors and assigns, within two years from the delivery of these presents, as shall be endorsed hereon by either party, one-half of the actual cost of construction of said road-bed and road through said park and said tunnel and cut unless within said two years said party of the first part determines it will not use the same or any part thereof and delivers to said party of the second part a good and sufficient deed granting and conveying to said party of the second part,
446 its successors and assigns, any and all right, title, or interest in law or in equity it may have in and to said road-bed, road, or property in said park, tunnel, and cut, free and clear of all incumbrances; and if said election and conveyance is not made within the time specified by it said party of the first part does covenant and agree to pay, besides one-half of the cost of construction, also the one-half of the actual cost of maintaining said road-bed and road in, upon, and through said park and said tunnel and cut from and after the time the party of the first part commences to use the same during or within the said period of two years and as long as it continues to use the same within said period of two years, and if it continues to use the same after said period of two years, then forever thereafter, whether it uses the same or not.

And, for the purpose of fixing said payments to be made, it is agreed that the said cost of construction is to be taken and paid at whatever sum may be sworn to in affidavit by any chief engineer and treasurer of the party of the second part as correct and as appearing on and from the construction account on the books of said second party, and said cost of maintaining is to be taken and paid at whatever sum may be sworn to in affidavits by the superintendent and treasurer of the party of the second part and as appearing upon and from the books of said second party; and it is further expressly understood, covenanted, and agreed that should said party of the first part, its successors or assigns, fail or refuse to make the said payments or either of them or any part thereof on demand at any time after the same or either of them becomes due or payable as aforesaid and as often as the same may occur and for sixty
447 days after such demands, then all the rights, privileges, franchises, powers, immunities, improvements, and property of said party of the first part in, through, or upon said Forest park and in, into, through, over, or upon said tunnel and cut shall become, by virtue and force of said failure and refusal, without further process or proceedings, forfeited and belong to the party of the second part, its successors and assigns; nd in case of such forfeiture no further payments as above provided are to be made by the party of the first part; but the party of the second part may and hereby is fully authorized and empowered to at once enter upon the sole and absolute possession and enjoyment of all said rights, privileges, fran-

chises, powers, immunities, improvements, and property, to the exclusion of said party of the first part, its successors and assigns; and said party of the first part hereby further covenants and agrees for itself, its successors and assigns, upon its failure to pay as aforesaid, that it (said first party) shall and will, by a good and sufficient deed, convey all said rights, privileges, franchises, powers, immunities, improvements, and property to said party of the second part, its successors and assigns.

It is further covenanted and agreed that the party of the first part may, within said period of two years from the delivery of these presents, lay a third rail for a narrow-gauge track through said park, tunnel, and cut, provided the same be done in a manner not to interfere with running of trains or operation of the road as it requires by the party of the second part; and provided further, that, whether it lays a third rail or not, the party of the first part is to make
448 payment for construction and maintaining of said road and road-bed as hereinabove provided.

In testimony whereof the said parties hereto have caused these presents to be executed by their respective presidents and attested by their respective corporate seals, with the signatures of their respective secretaries, the day and year first above mentioned.

THE ST. LOUIS COUNTY RAILROAD CO.,
By JOSEPH BROWN, *President.*

Attest:
[SEAL.] H. R. BRIGGS,
Secretary.

ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY CO.,
By B. W. LEWIS, JR., *President.*

Attest:
[SEAL.] JAMES F. HOW,
Secretary.

449 EXHIBIT B.

This agreement, made this eleventh day of August, 1875, by and between the commissioners of Forest park of the city and county of St. Louis, Missouri, party of the first part, and the St. Louis County Railroad Company, its successors or assigns, party of the second part, and the St. Louis, Kansas City and Northern Railway Company, its successors or assigns, party of the third part, witnesseth:

That said Forest park commissioners, in consideration of the relinquishments, agreements, and stipulations hereinafter contained on the part of said party of the second part, do hereby accept and approve the line and grade of said railroad as laid down and described upon the accompanying plat and profile hereto attached and forming part of this agreement, and said line and grade, in case there is no forfeiture of this agreement, is hereby fixed as the sole and finally established right of way to which said party of the second part is entitled by statute or otherwise through said park or any part thereof, and the width of said right of way as established by

statute is hereby reduced from seventy (70) feet and fixed at forty-two (42) feet between its outer points; but it is understood and agreed that said party of the second part or its assigns shall have the right to excavate or deposit earth outside of said forty-two
450 (42) feet whenever and wherever it may become necessary to do so to make the cuts, fills, and embankments for said railroad in its construction.

And said party of the second part, in consideration of the foregoing agreements on the part of said park commissioners, does hereby relinquish twenty-eight (28) feet off the seventy (70) feet established by statute for its right of way through Forest park except in case of a forfeiture of this agreement, and provided that in case the right of way herein described and established shall not be promptly placed at the disposal and to the use of said party of the second part or its assigns, or in case of any unreasonable delay or hindrance on the part of said park commissioners in regard to placing said party of the second part or its assigns in possession of said right of way under the terms and conditions of this agreement, then and in such case, at the option of the said party of the second part or its assigns, said want of promptness or said delay or hindrance shall work a forfeiture of this agreement, and in case of any forfeiture of this agreement the parties hereto shall be restored to all their rights as fully and absolutely as if this agreement had never been made and entered into. It is further mutually understood and agreed by and between the parties to this agreement as follows, to wit:

First. That the party of the second part or its assigns shall, at their own cost and expense, make and construct or cause to be made and constructed the excavations and embankments required for their road-bed in accordance with the grade line as laid down on the profile hereto attached, and that all extra earth not required in said construction shall be hauled and dumped where and as
451 directed by said park commissioners; provided, however, that all extra haul therefor shall be paid by said park commissioners.

Second. The party of the second part or its assigns shall also, at their cost and expense, make and construct or cause to be made or constructed a tunnel for a continuous distance of one hundred (100) feet, commencing at the east line of Barnes avenue, where the same is intersected by the line of said railroad, running thence westwardly under Barnes avenue and extending the entire distance of said one hundred (100) feet, and the remainder of said excavation shall continue an open cut or be roofed over at the option and cost of said park commissioners.

Third. The slopes of said excavations and embankments shall be sodded or sown with grass by said party of the second part or its assigns, and the ties neatly covered, and all shall be so kept and maintained by said party of the second part or its assigns, and in case of failure so to do by said party of the second part or its assigns the said park commissioners may do so at the expense of said party of the second part or its assigns; provided, however, that in case said park commissioners desire to have said slopes of the excava-

tions and embankments constructed at a gentler slope or less steep than that required by said party of the second part or its successors or assigns, said park commissioners may do so at their own cost and expense of additional construction and maintenance.

Fourth. The tracks and road-bed through said park shall be fenced in or roofed over by and at the option of said party of
452 the second part or its successors or assigns in an ornamental manner, to be agreed upon by the parties hereto.

Fifth. A depot shall be built and permanently maintained on a plan and at a place to be approved by the parties of the first and second parts, and said party of the second part and its assigns shall contribute three thousand (3,000) dollars in cash towards the payment thereof; provided that said depot shall be located wholly outside of the right of way of the party of the second part, as herein provided, but immediately adjoining the track or siding thereof.

Sixth. There shall be a switch or siding, the location of which shall be fixed by the consent of the parties and outside of said right of way at said depot, to be used only by trains stopping in said park, said depot and siding to be used only for park purposes by the party of the second part or its successors or assigns thereto.

Seventh. All said tracks, depot, slopes, and permanent improvements of the party of the second part shall be kept and maintained in a clean and neat condition, or, in default thereof, said park commissioners may do so at the reasonable expense of said party of the second part or its assigns, and no material alteration or change shall be permitted in said tracks without the consent of all the contracting parties hereto, nor in said depot or siding without the consent of the parties of the first and second parts hereto.

Eighth. The work of constructing said railroad through said park shall be commenced in good faith by the party, as hereinafter specified, within ninety (90) days from the delivery hereof, and shall be completed in one year thereafter under penalty of a forfeiture
453 of this agreement, and upon completion thereof the railroads shall be operated through said park so as to prevent unnecessary noise or inconvenience to the public, as far as reasonably practicable, and the roads or their assigns shall comply with all reasonable rules or regulations of said park commissioners in that respect, and all of the aforesaid permanent improvements shall be kept and maintained in such condition as will not injuriously affect or mar the landscape beauty of the park, this provision referring to the aforesaid forty-two (42) feet right of way road-bed; and said party of the second part or its assigns shall also keep its police or guard, within the limits of the park, neatly uniformed.

Ninth. Said party of the second part shall permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park and up to the terminus of its road in the city of St. Louis, upon such terms and for such fair and equitable compensation to be paid to it therefor as may be agreed upon by such companies.

Tenth. Said party of the second part hereby admits that its right of way hereinbefore described, with the conditions above stated, is

not exclusive of a right of way to any other railroad through any other portion of said park, and nothing herein contained shall be construed to limit or impair any right now held or which may hereafter be conferred upon said park commissioners to grant to other railroads a right of way over or above or under other portions of said park.

Eleventh. This agreement on the part of the parties of the second and third parts shall, within a reasonable time, as soon as
454 practicable, be ratified by a majority in interest of the stockholders of said railroad companies.

Twelfth. And whereas for the purpose of enabling the party of the third part to reach the Union depot of St. Louis, Missouri, an amicable arrangement and agreement for a right of way outside of and through said Forest park has been made and entered into by and between the parties of the second and third parts, and in pursuance thereof the parties of the second and third parts are to enter upon and enjoy the right of way and all the rights, privileges, immunities, powers, improvements, and property belonging to or vested in or that may belong to or vest in the party of the second part, in common, in, upon, and through said park, under certain regulations, terms, and conditions agreed upon by and between said parties therein; and whereas the party of the third part, in further pursuance of said last-named agreement, is about to construct, maintain, and operate a railroad in, upon, and through said park, at great expense, and to engage in other great outlays and to assume other heavy burthens and responsibilities to be of advantage to said third party through the continued enjoyment of said right of way and other rights, privileges, powers, franchises, immunities, improvements, and property in, upon, and through said park: Now, therefore, in view of the premises and as inducements to said party of the third part to proceed as intended, the party of the first part does hereby grant and convey unto and license and permit the said party of the third part, its successors and assigns, to have, hold, use, and enjoy said right of way in, upon, and through said park in common with and to be held and enjoyed jointly with said party
455 of the second part and its assigns, on the terms of the said contract between them and under the same terms and conditions as are hereby and hereinbefore imposed upon said party of the second part, and which are hereby assumed by said party of the third part, as to improvements, except as to building a depot and switch in said park, which the party of the second part is to do itself; or in case said party of the second part, its successors or assigns, should forfeit its said rights, privileges, and franchises in, upon, and through said park or from any cause cease to have, maintain, or enjoy the same, then it is hereby agreed and covenanted that the party of the third part shall not also be excluded from said park, but shall, with its successors and assigns, continue to have, maintain, and enjoy all of said rights, privileges, immunities, franchises, improvements, and property, on the terms hereinbefore set forth, continuously and forever.

Thirteenth. As said party of the second part and its assigns is, as

above provided, to have and maintain a depot in said park, said party of the third part is hereby released from maintaining or having any depot therein, and it is agreed said party of the third part shall not have or maintain any depot in said park, but said party of the second part shall erect and maintain said depot.

Fourteenth. It is hereby expressly understood, covenanted, and agreed by all of the parties hereto that said contract of even date herewith has been made between the parties of the second and third parts hereto, by which the party of the third part hereto has agreed with the party of the second part hereto that it will execute, perform,
456 and comply with all of the terms, provisions, and things herein to be done, performed, or complied with by the party of the second part hereto as to said improvements, except the depot and switch in said park. Now, therefore, in consideration thereof and of the agreement of the party of the third part herein, the party of the first part herein accepts the agreement and contract of the party of the third part herein to execute, perform, and comply with all of the terms, provisions, and things herein mentioned to be done, performed, or complied with as to said improvements, except as aforesaid, by the party of the second part hereto, and in lieu and stead of said party of the second part hereto, so far as assumed as aforesaid, releasing it therefrom, and in consideration thereof the party of the third part hereto covenants and agrees with the other parties hereto that it will, in lieu and stead of the party of the second part hereto, do, perform, and comply with all the terms and provisions, matters and things, herein expressed to be done, performed, or complied with by said party of the second part as to said improvements, except as aforesaid, subject to the terms and conditions in said agreement of even date herewith contained, and it is hereby expressly covenanted and agreed that a compliance by the party of the third part for itself or for itself and the party of the second part jointly in the construction of said railroad in, upon, and through said park, tunnel, and cut in accordance with the terms of this agreement shall be taken and accepted as performance of the conditions imposed upon said party of the second part; and it is further expressly covenanted and agreed that all and every part of
457 the work, its kind, description, and extent, to be performed by either of said parties of the second or third parts is hereinabove expressed, and neither of said parties shall be held or required to do or perform any other or further work and conditions than those hereby definitely set forth; and it is further understood, covenanted, and agreed that neither of the parties of the second or third parts are required or expected to supply the material or do the work necessary to construct or maintain either of the arched entrances into or exits from said park, as marked on the plat or profile hereinbefore referred to, but that said arches, material, and work are to be done and paid for by the parties of the first part; and said parties of the first part shall proceed and erect said arches, entrances, or exits expeditiously and so as to cause no delay to the parties of the second and third parts or either of them in

constructing, maintaining, and operating said railroad or either of them.

In testimony whereof the board of commissioners of Forest park have caused this agreement, after having been approved by the board, to be signed by the president, with the seal of the board attached, and attested by the secretary of said board, and the said parties of the second and third parts hereto have caused these presents to be executed by their respective presidents and attested by their respective corporate seals, with the signatures of their respective secretaries, the day and year first above mentioned.

BOARD OF COMMISSIONERS OF FOREST PARK,
By ANDREW McKINLEY, *President.*

{Copy of seal: Seal Forest Park, St. Louis, Mo. Forest Park, West Av., East Av., South Av., North Av.}

Attest: CHAS. BLAND SMITH, *Secretary.*

458 THE ST. LOUIS COUNTY RAILROAD CO.,
By JOSEPH BROWN, *President.*

[Copy of seal: The St. Louis County Railway Company, Missouri.]

Attest: H. R. DRIGGS, *Secretary.*

ST. LOUIS, KANSAS CITY & NORTHERN R'Y CO.,
By B. W. LEWIS, JR., *President.*

[Copy of seal: St. Louis, Kansas City and Northern Railway Co., 1872.]

Attest: JAMES F. HOW, *Secretary.*
[SEAL.]

Filed and recorded September 5th, 1879, at 9.45 a. m.
C. W. IRWIN, *Recorder.*

NOTE.—The words "part hereto," on line 22, and "part for," on line 36, page 11 of this record, are interlined in the original instrument.

STATE OF MISSOURI, } ss:
City of St. Louis, }

I, the undersigned recorder of deeds for said State, certify the foregoing to be a true copy of an instrument of writing executed by the commissioners of Forest park *et al.*, together with the plats annexed thereto and date of filing and recording thereof, as the same remains on record in my office, in Book 620, page 8.

Witness my hand and official seal this 18th day of December, A. D. 1884.

[SEAL.] THOMAS F. FARRELLY, *Recorder.*

459 EXHIBIT C.

This indenture, made the eleventh day of August, in the year of our Lord one thousand eight hundred and seventy-five, by and be-

tween the Saint Louis County Railroad Company, a corporation duly organized under and in accordance with the general statutes of the State of Missouri, party of the first part, and the St. Louis, Kansas City & Northern Railway Company, also a corporation duly organized under and in accordance with the general statutes of the State aforesaid, party of the second part, witnesseth:

That the party of the first part, for and in consideration of the sum of one hundred and twenty-five thousand dollars ($125,000) lawful money of the United States to it duly paid by the party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and in pursuance of the terms of a certain contract made and executed by and between the parties of the first and second parts hereto and dated August eleventh, A. D. 1875, and in full satisfaction of so much of said contract as relates to the conveyance of certain pieces of land and right of way to said party of the second part by said party of the first part, hath granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey, and confirm, unto the party of the second part and its successors and assigns forever all the following pieces of land, situate, lying, and being in the city of St. Louis and State of Missouri, to wit:

First. All that certain piece of land situate as aforesaid, between Tayon avenue and Mercer street, in city block numbered sixteen hundred and seventy-four (1674), bounded and described as follows, to wit: Beginning at a point on the western line of Tayon avenue seventeen (17) feet south of the northeast corner of the land of the party of the first part, running thence southwardly thirty (30) feet along said western line of Tayon avenue to the northern line of the land of the Pacific Railroad Company (of Missouri); thence westwardly four hundred and seventy-eight (478) feet on a line parallel to the first alley south of Randolph street; thence southwestwardly four hundred and fifty (450) feet along the southern line of
460 the land of the party of the first part to the western line of said block at a point one hundred and twenty-two (122) feet south of the north line of the land of the party of the first part; thence northwardly on a line parallel to said Mercer street to a point thirty (30) feet distant from the last-named line, measured at right angles thereto; thence northeastwardly and parallel to said southwestwardly line four hundred and fifty (450) feet to a point; thence eastwardly and parallel to said first alley south of Randolph street four hundred and seventy-eight (478) feet, more or less, to the point of beginning.

Second. All that certain piece of land situate as aforesaid, between Tayon avenue and Mercer street, being in city block numbered sixteen hundred and ninety (1690), bounded and described as follows, to wit: Beginning at a point on the east line of said block one hundred and twenty-two (122) feet south of the northern line of the land of the party of the first part, running thence southwestwardly along the southern line of the land of the party of the first part two hundred and sixty-seven (267) feet, more or less, to the eastern

line of said Mercer street; thence northwardly along said eastern line of Mercer street to a point thirty (30) feet distant from the last-named line, measured at right angles thereto; thence northeastwardly and parallel to said southwestwardly line two hundred and sixty-seven (267) feet, more or less, to the intersection of the eastern line of said block; thence southwardly along the said eastern line of said block to the point of beginning.

Third. All that certain piece of land situate as aforesaid, between Mercer and Noeme streets, in city block number seventeen hundred and four (1704), and being parts of lots numbered seventeen (17), eighteen (18), nineteen (19), twenty (20), and twenty-one (21), bounded and described as follows, to wit: Beginning at a point in the western line of said Mercer street fifty (50) feet south of the northeast corner of said block, running thence southwestwardly along the southern line of the land of the party of the first part one hundred and forty (140) feet, more or less, to a point on the western line of said lot numbered seventeen (17) one hundred (100) feet south of the south line of Scott street; thence northwardly along said western line of said lot numbered seventeen (17) to a point thirty (30) feet distant from the last-named line, measured at right angles thereto; thence northeastwardly and parallel to said southwestwardly line one hundred and forty (140) feet, more or less, to the said western line of Mercer street; thence southwardly along said western line of Mercer street to the point of beginning.

461 Fourth. All that certain piece of land situate as aforesaid, between Mercer and Noeme streets, in city block numbered seventeen hundred and four (1704), being a part of the lots numbered fourteen (14) and fifteen (15), bounded and described as follows, to wit: Beginning at a point on the eastern line of said lot numbered fifteen (15) one hundred and ten (110) feet south of the south line of Scott street, running thence southwestwardly along the southern line of the land of the party of the first part fifty-five (55) feet, more or less, to a point in the western line of said lot numbered fourteen (14); thence northwardly along the said western line of said lot to a point thirty (30) feet distant from the last-named line, measured at right angles thereto; thence northeastwardly and parallel to said southwestwardly line fifty-five (55) feet, more or less, to the eastern line of said lot numbered fifteen (15); thence southwardly along the said eastern line of said lot to the point of beginning.

Fifth. All that certain piece of land situate as aforesaid, between Mercer and Noeme streets, in city block numbered seventeen hundred and four (1704), and being part of lots numbered seven (7) and eight (8), bounded and described as follows, to wit: Beginning at the northeast corner of said lot numbered seven (7), running thence southwardly along the west line of the first alley east of and parallel to said Noeme street to the southern line of the land of the party of the first part; thence southwestwardly along said southern line to the eastern line of said Noeme street; thence northwestwardly along said eastern line of Noeme street to a point thirty (30) feet distant from the last-named line, measured at right angles thereto;

thence northeastwardly by a line parallel to the said southwestwardly line of the intersection of the northern line of said lot numbered seven (7); thence eastwardly along the northern line of said lot numbered seven (7) to the point of beginning.

Sixth. All that certain piece of land situate as aforesaid, between Noeme and High streets, being in city block numbered twenty-two hundred and seventy-two (2272), bounded and described as follows, to wit: Beginning at a point on the south side of Half street eighty (80) feet west of the northeast corner of said block, running thence in a southwestwardly direction three hundred and forty-seven (347) feet, more or less, along the southern line of the land of the *property* of the first part to the southwest corner thereof, one hundred and twenty-four (124) feet south of the south line of Half street;
462 thence northwardly along the west line of the land of the party of the first part and parallel to said High street to a point thirty (30) feet distant from the last-named lines, measured at right angles thereto; thence northeastwardly by a line parallel to said southwestward line to the intersection of Half street; thence eastwardly along the southern line of Half street to the point of beginning.

Seventh. All that certain piece of land situate as aforesaid, between High street and Jefferson avenue, in city block numbered seventeen hundred and seven (1707), being part of lots numbered fourteen (14), fifteen (15), sixteen (16), and seventeen (17), bounded and described as follows, to wit: Beginning at a point in the western line of said High street at the southeast corner of the land of the party of the first part, running thence southwestwardly along the southern line of the land of the party of the first part one hundred and sixty-four (164) feet, more or less, to the southwest corner of the land of the party of the first part; thence northwardly along the western line of said lot numbered seventeen (17) to a point thirty (30) feet distant from the last-named line, measured at right angles thereto; thence northeastwardly by a line parallel to said southwestern line one hundred and sixty-four (164) feet, more or less, to the said west line of High street; thence southwardly along said line of High street to the point of beginning.

Eighth. All that certain piece of land situate as aforesaid, between High street and Jefferson avenue, bounded and described as follows, to wit: Beginning at a point at the intersection of the south line of Gratiot or Cooper street with the northern line of the land of the said Pacific Railroad Company four hundred and twenty-seven feet and six (427.6) inches, more or less, east of said Jefferson avenue, running thence southwestwardly along the southern line of the land of the party of the first part four hundred and fifty (450) feet, more or less, to the eastern line of said Jefferson avenue; thence northwardly along the eastern line of Jefferson avenue to a point thirty (30) feet distant from the last-named line, measured at right angles thereto; thence northeastwardly by a line parallel to said southwestern line to the intersection of the southern line of Gratiot or Cooper street; thence eastwardly along said southern line of Gratiot or Cooper street to the point of beginning.

Ninth. All that certain piece of land situate as aforesaid, between Jefferson and Summit avenues, being in city blocks numbered twenty-two hundred and fifty-two (2252) and twenty-two hundred and fifty-seven (2257), bounded and described as follows, to
463 wit: Beginning at a point on the eastern line of Jefferson avenue forty-two (42) feet south of the southern line of Cooper street and at the southeast corner of the land of the party of the first part, running thence westwardly along the southern line of the land of the party of the first part and the northern line of the land of the said Pacific Railroad Company ten hundred and seventy-one (1,071) feet, more or less, to the southwest corner of the land of the party of the first part ninety-two (92) feet south of the south line of Cooper street; thence northwardly along the western line of the land of the party of the first part and parallel to said Summit avenue to a point thirty (30) feet distant from the last-named line, measured at right angles thereto; thence eastwardly by a line parallel to said westwardly line and the southern line of the land of the party of the first part ten hundred and seventy-one (1,071) feet, more or less, to the said western line of Jefferson avenue; thence southwardly along the western line of Jefferson avenue to the point of beginning.

Tenth. All that certain piece of land situate as aforesaid, between Montrose and Maguire avenues, in city block numbered twenty-five hundred and forty-nine north (2549 N.), being part of lot numbered twelve (12), bounded and described as follows, to wit: Beginning at a point on the eastern line of said lot ninety-one feet and seven inches (91 ft. 7 in.) south of the south line of Cooper street, running thence westwardly along the southern line of the land of the party of the first part to the western line of said lot; thence northwardly along the western line of said lot to a point thirty (30) feet distant from the last-named line, measured at right angles thereto; thence eastwardly, by a line parallel to said western line, to the eastern line of said lot; thence southwardly along the said eastern line to the point of beginning.

Eleventh. All that certain piece of land situate as aforesaid, between Montrose and Maguire avenues, in city block numbered twenty-five hundred and forty-nine north (2549 N.), being a part of lots numbered one (1), two (2), and three (3), bounded and described as follows, to wit: Beginning at the southeast corner of said lot numbered three (3), it being also the southeast corner of the land of the party of the first part, running thence westwardly along the southern line of said lots and the southern line of the land of the party of the first part eighty-two (82) feet, more or less, to the eastern line of said Maguire avenue; thence northwardly along the eastern line of Maguire avenue to a point thirty (30) feet distant from the last-named line, measured at right angles thereto;
464 thence eastwardly, by a line parallel to said westwardly line, to the eastern line of said lot numbered three (3); thence southwardly along said eastern line to the point of beginning.

Twelfth. All that certain piece of land situate as aforesaid, between Maguire and Compton avenues, in city block numbered

twenty-two hundred and thirty-six north (2236 N.), being part of lot numbered sixteen (16), bounded and described as follows, to wit: Beginning at a point in the western line of Maguire avenue sixty-five feet seven and one-fourth inches (65 ft. 7¼ in.) south of the south line of Cooper street, it being the southeast corner of said lot, running thence westwardly along the southern line of said lot to the southwest corner thereof; thence northwardly along the western line of said lot to a point thirty (30) feet distant from the last-named line, measured at right angles thereto; thence eastwardly, by a line parallel to said westwardly line, to the western line of Maguire avenue; thence southwardly along the said western line of Maguire avenue to the point of beginning.

Thirteenth. All that certain piece of land situate as aforesaid, between Maguire and Compton avenues, in city block numbered twenty-two hundred and thirty-six north (2236 N.), being the southern part of lots numbered one (1), two (2), three (3), four (4), five (5), six (6), and seven (7), bounded and described as follows, to wit: Beginning at the southeast corner of said lot numbered seven (7), it being forty-nine feet and two inches (49 2) south of the south line of Cooper street, running thence westwardly along the southern line of said lots one hundred and seventy-eight feet and five and one-half inches (178 5½), more or less, to the southwest corner of said lot numbered one (1); thence northwardly along the eastern line of said Compton avenue to a point thirty (30) feet distant from the last-named line, measured at right angles thereto; thence eastwardly, by a line parallel to said westwardly line, to the eastern line of said lot numbered seven (7); thence southwardly along said eastern line of said lot to the point of beginning.

Fourteenth. All that certain triangular piece of land situate as aforesaid, between Compton and Ranken avenues, being in city block numbered twenty-two hundred and thirty-one (2231), bounded and described as follows, to wit: Beginning at the northeast corner of the land of the party of the first part, running thence southwestwardly twenty-eight (28) feet along the west line of Compton avenue; thence northwestwardly one hundred and seventeen (117) feet along the northern line of the land of said Pacific Railroad
465 Company to a point in the northern line thereof, and thence eastwardly one hundred and fourteen (114) feet, more or less, along the lands of David Ranken, Jr., to the point of beginning.

Fifteenth. All that certain piece of land situate as aforesaid, between Ranken and Theresa avenues, being part of city block numbered twenty-two hundred and seventeen (2217), bounded and described as follows, to wit: Beginning at a point on the western line of Ranken avenue, at the southeast corner of the land of the party of the first part, running thence northwestwardly four hundred and twenty-five (425) feet along the southern line of the land of the party of the first part, the northern line of the land of the said Pacific Railroad Company, to the eastern — of said Theresa avenue; thence northwardly along the eastern line of Theresa avenue to a point thirty (30) feet distant from the last-named line, measured at right angles thereto; thence southeastwardly by a line parallel to

said northwestwardly line four hundred and twenty-five feet (425) feet, more or less, to the western line of said Ranken avenue; thence southwardly along the western line of Ranken avenue to the point of beginning.

Also all of the following-described pieces of land, situate, lying, and being in the county of St. Louis and State of Missouri aforesaid, to wit:

First. All that certain piece of land situate as aforesaid, between Cabanne street and the Manchester road, bounded and described as follows, to wit: Beginning at a point on the eastern line of the land of the party of the first part twenty-two (22) feet north of the southeast corner of said tract of land, running thence westwardly by a curved line bearing north to the northeast corner of the land of Thomas Brooks and the southeast corner of the tract of land conveyed to said party of the first part by the said Brooks by deed dated March 29th, 1873, and recorded in the county recorder's office of St. Louis county in Book 461, page 524; thence westwardly along the southern line of the land of the party of the first part two hundred and thirty six (236) feet to the southwest corner of said tract; thence northwardly along the western line of said tract of land to a point twenty-eight (28) feet distant from the last-named line, measured at right angles thereto; thence eastwardly by a line par-
466 allel to said westwardly line and said curved line respectively to the eastern line of the land of the party of the first part; thence southwardly along said eastern line and along the western line of the land now or formerly owned by William G. Webb to the point of beginning.

Second. All that certain piece of land situate as aforesaid, being a part of United States survey numbered sixteen hundred and fifty-seven (1657), bounded and described as follows, to wit: Beginning at a point in the western line of Musick's Addition seventeen (17) feet south of the northern line of said survey and of the northeast corner of the land of the party of the first part, running thence southwardly along the said western line of Musick's Addition and the eastern line of the land of the party of the first part twenty-eight (28) feet; thence westwardly along the southern line of the land of the party of the first part and the northern line of land of Ghio and Lebeaume respectively eight hundred and sixty-four feet three inches (864 ft. 3 in.) to the southwest corner of the land of the party of the first part; thence northwardly along said western line of the land of said first party and parallel to the western line of Musick's Addition twenty-eight (28) feet; thence eastwardly by a line parallel to said westerly line to the point of beginning—

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part in and to the same and every part and parcel thereof, with the appurtenances; to have and to hold the above granted, bargained, and described premises, with

the appurtenances, unto the said party of the second part and its successors and assigns to its and their own proper use, benefit, and behoof forever; and said party of the first part, for itself and its successors, the above-described and hereby granted and released premises and every part and parcel thereof, with the appurtenances, unto the said party of the second part and its successors and assigns against the said party of the first part and its successors and against all and every person and persons whomsoever lawfully claiming or to claim the same shall and will by these presents warrant and forever defend.

And also the said party of the first part hath conveyed, assigned, and transferred, and by these presents doth convey, assign, and
467 transfer, unto the said party of the second part and to its successors or assigns all its right, title, interest, estate, claim, and demand, as well in law as in equity, of, in, and to the following piece of land, situate, lying, and being in the county of St. Louis and State of Missouri aforesaid, bounded and described as follows, to wit:

First. The right of way over and upon the following-described piece of land, situate as aforesaid between the Manchester road and King's highway, and being all of said right of way granted to said party of the first part by John S. McCune by deed dated November 29th, 1871, and recorded in the recorder's office of St. Louis county aforesaid in Book 439, page 355, bounded and described as follows, to wit: A strip of land twenty-five (25) feet wide extending from the northwest corner of the land of said McCune and one Dougherty N. 81° west along the north line of said McCune's land for a distance of seventy-seven (77) feet, thence on a strip forty (40) feet wide, embraced in parallel lines equally distant from a central line beginning at the northwest corner of the above-described strip, and running thence westwardly by a curve bearing southward, having a radius of twenty-three hundred and sixty-five (2,365) feet, for a distance of four hundred (400) feet; thence by a straight line S. 80° 10′ W. for a distance of one hundred and thirty-five (135) feet; thence by a curve northward, having a radius of twelve hundred and eighty-seven (1,287) feet, for a distance of three hundred and ninety-five (395) feet, and thence by a straight line N. 72° 50′ west for a distance of two hundred and ten (210) feet to King's highway, saving and excepting a strip of land twelve (12) feet in width off and from the northern part of said right of way and for the whole length thereof, which said strip of land is reserved to the party of the first part.

Second. The right of way over and upon the following-described piece of land, situate as aforesaid between King's highway and Union avenue, being a strip of land twenty-eight (28) feet in width off the southern portion and for the whole length thereof of that part of the right of way granted to said party of the first part by W. D. Griswold by deed dated November 3, 1871, and recorded in the office of the recorder of St. Louis county aforesaid in Book 443, page 96, lying between the northern line of Forest park and the eastern line of Union avenue, all of which right of way conveyed by said deed is described as follows, to wit: A strip of land forty (40) feet in width, the cen-

tre line of which begins at King's highway twenty (20)
468 feet north of the southeast corner of the land of said Griswold, known as the Cabanne dairy farm, and running thence westwardly along parallel to the south line thereof eight hundred and twenty-five (825) feet; thence by a curve eleven hundred and seventy (1,170) feet long bearing northwest with a radius of nineteen hundred and three (1,903) feet; thence by a line bearing north 55° W. about ten hundred and ninety (1,090) feet to a point on Union avenue not less than four hundred and eighty-seven (487) feet south of the northeast corner of Robert Forsyth's land.

Third. All that certain piece of land situated as aforesaid, between Mercer and Noeme streets, in city block S. No. 1704, and being part of lots numbered 17, 18, 19, 20, and 21, bounded and described as follows, to wit: Beginning at a point, thence southwardly along said west line of High street to the point of beginning.

The right of way over and upon the following-described pieces of land, situate as aforesaid between Union avenue and the Skinker road, being a strip of land twenty-eight (28) feet in width off and from the entire southern portion of a part of the right of way granted to said party of the first part by Robert Forsyth by deed dated November 17, A. D. 1871, and recorded in the office of the recorder of St. Louis county aforesaid in Book 442, page 55, which said part of the right of way so granted as aforesaid, is bounded and described as follows, to wit: A strip of land forty (40) feet wide, equally divided, twenty (20) feet on each side of a central line, commencing at a point in the western line of Union avenue four hundred and eighty (480) feet south of the northeast corner of the land of said Robert Forsyth, running thence in a northwest direction to a point on the dividing line between the lands of the estate of James W. Kingsbury, deceased, and of the said Robert Forsyth about ten hundred and fifty-five (1,055) feet west of the western line of Union avenue.

Fourth. The right of way over and upon the following piece of land, situate as aforesaid between Union avenue and the Skinker road, bounded and described as follows, to wit: A strip of land thirty (30) feet in width, and being all of that portion of the right of way granted to said party of the first part by said Robert Forsyth by deed aforesaid, lying along the northern line of his land and adjoining the land of the said Kingsbury estate, between a point ten hundred and fifty (1,050) feet west of Union avenue, and running thence westwardly to a point thirty-one hundred and twenty-five (3,125) feet west of Union avenue.

469 Fifth. The right of way over and upon the following-described piece of land, situate as aforesaid, between Union avenue and the Skinker road, bounded and described as follows, to wit: A strip of land twenty-eight (28) feet in width off and from the southern portion and for the entire length thereof of the right of way granted to said party of the first part by A. M. Waterman and others by deed dated April 14th, A. D. 1873, and recorded in the office of the recorder of St. Louis county aforesaid in Book 472, page 95, bounded and described as follows, to wit: A strip of land fifty (50) feet in width, twenty-five (25) on each side of a central

line, beginning thirty-one hundred feet (3,100) west of the west line of Union avenue at a point in the dividing line between the lands of the said Kingsbury estate and of Robert Forsyth and running northwestwardly at a tangent to a dividing line heretofore existing between the said Kingsbury estate and the land of Robert Forsyth, the said curve having its center to the north thereof and a radius of twenty hundred and twenty-two (2,022) feet, the length of said curve being eleven hundred and sixty-two (1,162) feet; thence the said central line runs straight on a course north 42½° west for a distance of twelve hundred and thirty-nine (1,239) feet to a point on the dividing line between said Kingsbury estate and the Deaver estate; all of which said pieces of land hereby conveyed are laid down, designated, and colored blue upon a map hereto attached and made a part hereof, marked "chart A;" and also the said party of the first part hath conveyed, assigned, and transferred, and by these presents doth convey, assign, and transfer, unto the said party of the second part and to its successors and assigns an undivided one-half of all the right, title, or interest of the party of the first part of, in, or to the right of way and of, in, or to any and all other rights, privileges, and franchises, powers, and immunities owned by or vested in or enjoyed by or that may hereafter be acquired and owned by, vested in, or enjoyed by the party of the first part in, through, or upon Forest park by any means or from any source whatever; all of which conveyances of the said rights of way in this deed mentioned are made subject to the terms and conditions upon which the same were granted to the party of the first part, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, and interest, property, possession, claim, and demand whatsoever,
470 as well in law as in equity, of the said party of the first part in and to the same and every part and parcel thereof, with the appurtenances; to have and to hold all the right, title, interest, claim, and demand whatsoever of the said party of the first part of, in, and to the above conveyed, assigned, and described premises, with the appurtenances, unto the said party of the second part and its successors and assigns to its and their own proper use, benefit, and behoof forever; and the party of the first part doth hereby, for itself, its successors and assigns, covenant to warrant and defend the premises and every part thereof unto the party of the second part, its successors and assigns, against the lawful claims of every person whomsoever.

In witness whereof the party of the first part, by its president, hereunto duly authorized by a vote of its directors and stockholders, and under its corporate seal, attested by its secretary, hath formally executed these presents this the day and year first above written.

[Copy of seal: The Saint Louis County Railroad Company, Missouri.]

THE ST. LOUIS COUNTY RAILROAD COMPANY,
By JOSEPH BROWN, *President.*
Attest: H. R. DRIGGS, *Secretary.*

STATE OF MISSOURI, } ss:
County of St. Louis, }

Be it remembered that on this eleventh day of August, A. D. 1875, before me, the undersigned, a notary public, duly commissioned April 10th, 1874—commission expires April 6th, 1878—within and for the county and State aforesaid, personally appeared Joseph H. Brown, president, and H. R. Driggs, secretary, of the St. Louis County Railroad Company, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as president and secretary of the St. Louis County Railroad Company, party thereto, and who affixed thereto the seal of said corporation, and severally acknowledged that they executed and delivered the same as the act and deed of said corporation for the purpose therein contained.

Witness my hand and official seal the day and year first above mentioned.

{ Copy of seal: Lyne S. Brotherton, Notary Public, St. Louis County, Mo. }

LYNE S. BROTHERTON,
Notary Public, St. Louis Co., Mo.

471 *Chart "A."*

Referred to in deed of St. Louis County Railroad Co. to the St. Louis, Kansas City and Northern Railway Co., dated August 11th, 1875.

Plats attached to this deed were filed with transcript to c't of appeals.

Filed and recorded Aug. 13th, 9.05 a. m., 1875.

D. H. MACADAMS, *Recorder.*

NOTE.—The letters "ea" of the word "eastern," in 4th line, page 328 of this record, are written over an erasure, and the words and figures "duly commissioned April 10th, 1874, commission expires April 6th, 1878," in 30th and 31st, and the word "first," in 37th line, page 330 of this record, are interlined in the original deed.

STATE OF MISSOURI, } ss:
City of St. Louis, }

I, the undersigned recorder of deeds of said city, certify the foregoing to be a true copy of an instrument in writing executed by the St. Louis County Railroad Company to the St. Louis, Kansas City and Northern Railway Company, together with the certificate of acknowledged and annexed plats, and date of filing and recording thereof, as the same remains of record in my office in Book No. 526, page 324, and following.

Witness my hand and official seal this the seventeenth
[SEAL.] day of December, in the year of our Lord one thousand eight hundred and eighty-three.

THOS. F. FARRELLY, *Recorder.*

472 EXHIBIT D.

The Sterling and Webster Abstract Co., examiners of land titles, No. 615 Chestnut street, St. Louis, Mo.

B. B. Webster, pres't. Thos. R. Reynolds, sec'y.
F. G. Flanagan, treas'r.

ST. LOUIS, Mo., *July* —, 1886.

John C. Orrick, Esq.

SIR: We have examined the records of the city of St. Louis and annex hereto an abstract of all conveyances of record affecting the title to the railroad from the date of the deed of trust by the St. Louis County Railroad Company, October 9, 1875, recorded Book 529, page 332, to the date of the deed to the St. Louis, Kansas City and Northern Railway Company, recorded Book 608, page 45.

THE STERLING & WEBSTER ABSTRACT COMPANY,
By B. F. WEBSTER, *President.*

Attest:
[SEAL.] THOS. R. REYNOLDS, *Secretary.*

St. Louis County Railroad Company, a corporation duly incorporated under the general statutes of Missouri, &c., to Rufus J. Lackland and Gerard B. Allen, as trustees.

Deed of trust, dated October 1, 1875; recorded October 9, 1875, in Book 529, page 332; acknowledged at St. Louis county, Missouri, October 1, 1875, before Robert M. Foster, notary public, by Joseph Brown, president, and H. R. Diggs, secretary, of St. Louis County Railroad Company, and before same officer October 1, 1875, by Lackland and Allen.

Whereas the general statutes of Missouri, under which said company is incorporated, provide that "every corporation as such has power to hold, mortgage, or otherwise convey such real and personal estate as the purposes of the corporation shall require," and that every corporation formed under said general statutes relative to railroad companies shall have power "from time to time to borrow such sums of money as may be necessary for completing, finishing,
473 or operating their railroad, and to issue and dispose of the bonds for any amount so borrowed, and to mortgage their corporate property and franchise to secure the payment of any debts contracted by the company for the purposes aforesaid;"

Whereas at a meeting of the board of directors of said company, at its office in the city of St. Louis, August 11, 1875, it was

Resolved, That for the purposes of this company there be issued the bonds of the company to amount of $300,000.00, of the denomination of $1,000.00 each, to run for 30 years, with coupons attached for interest at 7 per cent., payable semi-annually in New York or St. Louis, principal and interest payable in gold, and that a mort-

gage to secure such bonds and interest be made upon the railroad of this company and its property and franchises after the conveyance shall be made to the St. Louis, Kansas City & Northern Railway Company to secure the payment of the bonds to be so issued and interest thereon, and that the president and secretary of the company duly execute and attest said bonds and mortgage with the seal of the company, and acknowledge and record said mortgage;

That said company, pursuant to aforesaid resolution of directors, issued bonds to the number of 300, and denomination of $1,000.00, each numbered consecutively from 1 to 300, of date even with this indenture, principal and interest being payable in the city of New York or in the city of St. Louis at the agency of said company, in gold, &c., on the 1st of October, 1895, and the interest thereon at the rate of 7 per cent., payable in gold at New York or St. Louis on first days of April and October, &c., bonds to be executed under seal of first party, signed by president and attested by secretary, &c., &c., and countersigned by trustees, &c., and sets forth form of bond and coupon and certificate by trustee:

Now, therefore, St. Louis County Railroad Company, party of first part, by virtue of the power granted by statute, &c., and for the purpose of securing the payment of principal and interest of said 300 bonds, &c., and $1.00, grants, bargains, and sells unto said Lackland and Allen, as trustees, and survivor, &c., and successor, "all and singular its line of railroad 20 miles in length, extending westwardly from the Union depot in the city of St. Louis, at Tayon avenue, parallel to the Pacific railroad of Missouri to Grand avenue, thence through Forest park and Union avenue, and thence to Creve Cœur creek, through the county of St. Louis, in the State of Missouri, together with all the right of way, depots, stations, rail-
474 ways, rails, ties, switches, machine shops, rolling stock, locomotives, cars, water-tanks, machinery, right, interest, and franchise of the said company, party of first part, now owned, possessed, or acquired or hereafter owned, possessed, or acquired on the aforesaid 20 miles of said company's line of road, and all the appurtenances to the above-described corporate property and franchises belonging or in anywise appertaining;" to hold same to said trustee and survivor:

Provided, &c., that if said company pay, &c., said bonds or the portion thereof that may be duly issued, &c., said principal and interest, then this deed shall be satisfied; but if failure be made in payment of interest or any of said bonds for 6 months after same becomes due, &c., and after demand made at the places hereinbefore designated, &c., then second parties and survivors, successors or successor in this trust are authorized and required, upon the written request of the holder or holders of 20 per cent. of said bonds in arrear and unpaid, to offer the said railroad, with all its property and interests, rights, and franchises herein conveyed, and to sell the same at public vendue to highest bidder, for cash, at court-house door, city of St. Louis—ninety days' notice, &c., by notice published weekly or oftener in at least one paper published in each of the cities of St.

Louis, New York, Philadelphia, and Boston, and upon such sale said trustees, &c., shall have power and this power shall be irrevocable to make, execute, and deliver any conveyance or conveyances that may be necessary to completely transfer and convey all the above-described property and all and every interest, right, or title of any kind or character which said railroad may have in said premises, &c., to purchaser, &c., who may immediately enter upon and take possession of said premises, effects, and franchises, and all benefit and equity of redemption therein of said company shall be forever barred, and provides for payment of securities out of funds after sale.

In witness whereof St. Louis County Railroad Company has caused its corporate seal to be hereto affixed and these presents to be subscribed by its president and secretary, &c., and mortgagees have signed as acceptance.

[CORPORATE SEAL.] THE ST. LOUIS COUNTY RAILROAD COMPANY,
By JOSEPH BROWN, *President.*
RUFUS J. LACKLAND, [SEAL.]
Trustee.
GERARD B. ALLEN, [SEAL.]
Trustee.

475 St. Louis County Railroad Company, a corporation, &c., by trustees, to Charles Miller.

Deed by trustees, dated June 8, 1877; recorded June 8, 1877, in Book 569, page 459; acknowledged at St. Louis county, Missouri, June 8, 1877, before C. D. Greene, Jr., notary public.

Sets forth deed of trust October 1, 1875, Book 529, page 332, to secure certain bonds, &c.; that said company did fail to pay, &c., the interest on said bonds secured by said deed of trust for six months after same became due, &c., and after demand made, &c., at places designated, and thereupon undersigned trustees, in pursuance to authority, &c., in said deed of trust given, did, upon the written request of the holders of more than 20 per cent. of said bonds in arrear and unpaid, proceed to offer the railroad of said company, with all its property and interest, rights and franchises, by the said deed of trust conveyed and hereinafter more fully described, and to sell the same at public vendue to highest bidder, for cash, at east-front door court-house, in St. Louis, on Saturday, May 26, 1877, first having given 90 days' notice thereof, &c., weekly in one paper published in each of the cities of St. Louis, New York, Philadelphia, and Boston, copies of which advertisement with proof of publication attached, and at such sale, Charles Miller being highest and best bidder, at $12,000.00, the said mortgaged premises and franchises were struck off and sold to him: Now, therefore, convey. Same description as in deed of trust.

Hands and seals.

RUFUS J. LACKLAND. [SEAL.]
GERARD B. ALLEN. [SEAL.]

Copy of trustees' sale sets forth deed of trust, 529, page 332; describes property as in deed; sale for cash at east-front door of courthouse, in St. Louis, Missouri, Saturday, May 26, 1877, between 9 and 5.

Proof of publication of above in St. Louis Dispatch, St. Louis, 14 times; first insertion February 23, 1877, and last May 23, 1877.

Proof publication in Boston Daily Globe on the 19th–26th Feb., March 5, 12, 20, 26, April 2, 9, 16, 23, 30, May 7, 14, and 21.

Proof publication in New York, in New York Daily Witness, once a week for 14 successive weeks, commencing February 24, 1877, and ending May 25, 1877.

This proof is taken before A. H. Bradley, notary public, New York, and the fact that he is a notary is proven by clerk
476 of city and county of New York by certificate to that effect.

Proof of publication in Philadelphia Inquirer 14 times, once each week, commencing February 20 and ending May 22, 1877, inclusive.

Charles Miller and wife, Ellen M. Miller, to St. Louis & Missouri River Railroad Company, a corporation.

Quitclaim deed, dated June 8, 1877; consid., $87,500.00; recorded June 8, 1877, Book 568, page 426; acknowledged at St. Louis county, Missouri, June 7, 1877, before J. R. Triplett, notary public.

Bargain, sell, convey, and confirm unto second party and its successors and assigns all that portion of the property and franchises of the St. Louis County Railroad Company, 6 miles in length, extending westward from the Union depot, in the city of St. Louis, at Tayon avenue, parallel to the Pacific railroad of Missouri to Grand avenue, thence through Forest park and Union avenue, and thence by Forsyth junction to the intersection of the Olive-street road with the old Bonhomme road, in the city of St. Louis, Missouri, together with all the right of way, rights, interests, and franchises on the aforesaid six miles of said company's line of road, and all appurtenances to the above-described corporate property and franchises belonging or in any way appertaining (it being a portion of the property and franchises which the St. Louis County Railroad Company, by Lackland and Allen, trustees, granted and conveyed unto said party of first part by deed of even date herewith and intended to be forthwith recorded).

Hands and seals.

CHARLES MILLER. [SEAL.]
ELLEN M. MILLER. [SEAL.]

The St. Louis & Missouri River Railroad Company, a corporation, to Joseph A. J. Aderton, trustee for Charles Miller.

Deed of trust, dated June 8, 1877; recorded June 8, 1877, in Book 572, page 345; acknowledged at St. Louis city and county, Missouri, June 8, 1877, before Valle F. Reyburn, notary public, by James O. Broadhead, president, and Joseph Shippen, secretary.

Conveys all and singular the property, both real and personal,

and franchises of said party of first part, consisting of all that portion of the property and franchises late of the St. Louis County Railroad Company, six miles in length, extending westwardly
477 from the Union depot, in the city of St. Louis, at Tayon avenue, parallel to Pacific railroad of Missouri to Grand avenue, and thence through Forest park and Union avenue, and thence by Forsyth junction to the intersection of the Olive-street road with the old Bonhomme road, in the city of St. Louis, Missouri, together with all the right of way, interest, and franchises owned, possessed, and acquired on the aforesaid 6 miles of said road, and all appurtenances to the above-described corporate property and franchises belonging or in anywise appertaining (being the same property and franchises that said first party acquired from Charles Miller by deed bearing even date herewith and intended to be forthwith recorded).

In trust to secure 25 notes of even date, numbered from 1 to 25, each for $500.00, payable on or before the first of December, 1877, at Valley National Bank, 8 per cent. interest from June 1, 1877.

ST. LOUIS & MISSOURI RIVER RAILROAD COMPANY,
By JAMES O. BROADHEAD, *President.*

Countersigned by—
JOSEPH SHIPPEN, *Secretary.*

No. —, with an impress of the corporate seal.

In case of default sale of said property at public vendue to highest bidder, at the east-front door of court-house, St. Louis city, for cash, 30 days' public notice, and on such sale shall execute deed in fee to purchaser.

Testimony — the St. Louis & Missouri River Railroad Company, by order of the board of directors, has hereunto affixed its corporate seal and caused the same to be signed by its president and countersigned by its secretary, and second party has hereto set his hand and seal.

ST. LOUIS & MISSOURI RIVER RAILROAD CO.,
By JAMES O. BROADHEAD, *President.*

Countersigned by—
[CORPORATE SEAL.] JOSEPH SHIPPEN, *Secretary.*

St. Louis & Missouri River Railroad Company, by trustee, to Herman A. Haeussler.

Deed by trustee, dated February 11, 1878; recorded February 14, 1878, in Book 589, page 158; acknowledged at city of St. Louis, Missouri, February 13, 1878, before H. G. Sachleben, notary public, of city of St. Louis.

Recites foregoing deed of trust, all of said notes due and unpaid, request of legal holder of 14 of said notes, and trustee, acting
478 in pursuance of provisions of said deed of trust, and having given over 30 days' public notice by advertisement in Mis-

souri Republican, copy advertisement and proof attached, did proceed to sell the property hereinafter described at public vendue to highest bidder, at east-front door of court-house, city of St. Louis, for cash, on 11th of February, 1878, between 10 and 5, when and where the same was struck off to said Haeussler, &c., at $12,500.00:

Now, therefore, convey "all and singular the property, both real and personal, and franchises of first party, consisting of all that portion of the property and franchises late of the St. Louis County railroad, 6 miles in length," &c., &c., acquired by said St. Louis and Missouri River railroad from Charles Miller.

Hand and seal.

J. A. J. ADERTON. [SEAL.]

Copy of advertisement attached sets forth deed of trust, 572, page 345, and property therein described; sale February 11, 1878, between 10 and 5, east-front door of court-house, city of St. Louis, for cash.

Proof of publication in Missouri Republican 34 times, from January 9 to February 11, 1878.

St. Louis County Railroad Company, by sheriff of St. Louis, in execution, to Herman H. Haeussler.

Deed by sheriff, dated December 5, 1878; consid., $191.00; recorded Book 605, page 167; acknowledged in open circuit court at city of St. Louis, December term, 1878, Thursday, December 5, 1878.

Recites that on the 15th October, 1877, two judgments were rendered in the circuit court, city of St. Louis, one in favor of James O. Broadhead and both against said St. Louis County Railroad Company, the one in favor of E. Harrison being for $23,347.86 and costs, and Broadhead for $7,261.63, debts and costs. Upon which judgments two executions were issued from clerk's office, one in favor of Harrison, November 7, 1878, and the other in favor of Broadhead against said St. Louis County Railroad Company, November 6, 1878, &c. Levy November 11, 1878, on all right, &c., and property of said company in and to the following-described real estate in city of St. Louis, Missouri:

1. A parcel of land beginning in the west line of Tayon avenue 153 feet 5 inches south of Randolph street, thence running west in a direct line 1,178 feet 7 inches, more or less, to a point in the east line of Mercer street which is 182 ft. 6 in. south of Randolph street; thence south on east line of Mercer street to a point; thence east
479 along north line of St. Louis, Kansas City & Northern railway to Tayon avenue, and thence north to beginning, and being in blocks 457 S., 1690, and 1674.

2. Lots 7, 8, 14, 15, 17, 18, 19, 20, and 21, block 1704.

3. A parcel of land in block 2272, bounded north by Half street, east by a point, and west by a line 60 feet east of and parallel to High street.

4. Lots 14, 15, 16, and 17, block 1707.

5. Parcel of land in block 2280, bounded east by a point, north by Gratiot street, and west by Jefferson avenue.

6. Parcel of land in blocks 2257 and 2252, bounded east by Jefferson avenue, north by Cooper street, west by line parallel to and 138 ft. 6 in. east of Summit avenue.

7. Lots 1, 2, 3, and 12, block 2549 north.

8. Lots 1, 2, 3, 4, 5, 6, and 7 and lot 16, block 2236.

9. Parcel of land in block 2217, 157 feet on Theresa avenue and of that width running east to west line Rankin avenue and bounded north by land of Taylor.

All of above nine parcels of land are bounded south by right of way of St. Louis, Kansas City & Northern Railway Company.

10. All that part of a seven-acre parcel of land between Cabanne street, Vandeventer avenue, and the northern projected line of Laurel street and the lands of Brooks and Neuer acquired by defendant of Pacific railroad by deed, 463, page 509.

11. Part of lots 4 and 5 of subdivision of lot, 74th series, Chouteau Mill tract, 60 feet wide by 449 feet deep on north line, bounded north by line 145 feet north of north line of Laurel street, if continued, and by land of Thomas Brooks, the southwest corner being 194 feet south of Manchester road.

12. A strip of ground 45 feet, more or less, in width and running from Vandeventer avenue to King's highway, and the south part of which is now used by St. Louis, Kansas City and Northern Railway Company as their right of way, said parcels being in surveys 1657 and 1332, Musick's Addition.

13. All the real estate or right of way over real estate or rights to use any property ever acquired or owned by said St. Louis County Railroad Company not embraced in foregoing description, as well as its rights and franchises not heretofore conveyed by it, the St. Louis, Kansas City & Northern Railroad Company, and having pre-
480 viously to day of sale, etc., given at least twenty days' notice of the time and place of sale and of real estate to be sold, etc., as the law directs, by advertisement in the St. Louis Times and St. Louis Times-Journal in English language and in Amerika in the German language, two daily newspapers printed in St. Louis, by virtue, etc., did on December 5th, 1878, between 9 and 5, at east-front door of court-house, during December term — circuit court, at the city of St. Louis, 1878, expose for sale at public auction all interests and estate and property of said St. Louis County Railroad Company of, in, and to the above-described real estate, together with all rights, etc., and said Haeussler being highest bidder for—

First. Described real estate in blocks 475 S., 1690, and 1674, at $50.00.

Second. At $1.00 each lot.

Third. At $5.00.

Fourth. $1.00 each lot.

Fifth. Block 2260, $1.00.

Sixth. Blocks 2257 and 2252, at $1.00.

Seventh. At $1.00 each lot.

Eighth. At $1.00 each lot, block 2236.

Ninth. At $25.00, land in block 2217.

Tenth. At $5.00.

Eleventh. $5.00, both lots.
Twelfth. $5.00.
And $50.00 for lastly described real estate and property.
In all $191.00.
Same struck off and sold to said Haeussler.
Now, therefore, convey, &c.
Witness John Finn, sheriff of the county of St. Louis, hand and seal.

[SEAL.] JOHN FINN, *Sheriff.*

481 Herman A. Haeussler and wife, Emilie Haeussler, to George S. Grover.

Quitclaim deed, dated December 23, 1878; consid., $1.00; recorded December 24, 1878, in Book 603, page 144; acknowledged at city of St. Louis, Missouri, December 23, 1878, before H. G. Sachleben, notary public.

A part of seven-acre piece of land, belonging to Missouri Pacific railroad, situated between Cabanne and Vandeventer avenues and other property, it being the intention of the party of the first part to convey to the party of the second part by this deed all and every part and parcel of the real estate conveyed to party of first part by J. A. J. Aderton, trustee, by deed of February 11, 1878, Book 589, page 58, and also all the parcels of real estate conveyed to said party by sheriff of St. Louis city December 5, 1878, and filed for record in the recorder's office of said city December 7, 1878, which have not been by warranty deed already conveyed to second party, and if any tracts or parcels of land conveyed to the party of the first part aforesaid by the deeds aforesaid are not herein specifically described they are nevertheless hereby conveyed to party of second part.
Hands and seals.

HERMAN A. HAEUSSLER. [SEAL.]
EMILIE HAEUSSLER. [SEAL.]

No part of the land in question was conveyed by Haeussler prior to above deeds.

George S. Grover and wife, Maggie C. Grover, to Wells H. Blodgett.

Deed of trust, dated December 24, 1878; recorded December 24, 1878, in Book 605, page 238.

Grant, bargain, and sell land in St. Louis, Missouri — lots 7, 8, 14, 15, 17, 18, 19, 20, 21, city block 1704, bounded south by right of way of St. Louis, Kansas City & Northern railroad and partially on the east by Mercer street, north by Scott avenue, and west by Neome street.
All that portion of block 2272 bounded south and east by St. Louis, Kansas City & Northern railroad, north by Half street, west by line 60 feet east of and parallel with east line of High street.

482 All parcel of land embraced in lots 14, 15, 16, and 17, block 1707, bounded north by line 50 feet from and parallel to north

line of right of way of Missouri Pacific railroad, south by north boundary line of right of way of St. Louis, Kansas City & Northern railway, west by lot 18, in block 1707, and on east by High street.

All parcel of land in block 2260, bounded south and east by right of way of St. Louis, Kansas City & Northern railroad, north by Gratiot or Cooper street, and west by Jefferson avenue.

All that parcel of land, blocks 2257 and 2252, bounded south by right of way of St. Louis, Kansas City & Northern railroad, east by Jefferson avenue, north by Cooper street, west by line 138 ft. 6 in. east of and parallel to east line of Summit avenue.

All that portion of lots 1 and 2 and 3 and 12, block 2549, not previously conveyed to St. Louis, Kansas City and Northern railway by St. Louis County Railroad Company, Book 526, page 324.

All that portion of lots 1, 2, 3, 4, 5, 6, 7, and 16, block 2236, not previously conveyed to St. Louis, Kansas City and Northern railroad, *and* Book 526, page 324.

All that parcel of land in block 2217 between Ranken avenue and Theresa avenue, 157 feet north of north line of right of way of Missouri Pacific railroad, as follows:

All that parcel of land in block 2217 between Ranken avenue and Theresa avenue, beginning in the west line of Ranken avenue 157 feet north of the north line of the right of way of the Missouri Pacific railroad, thence west parallel to said right of way 425 feet to east line of Theresa avenue; thence south on Theresa avenue 127 feet; thence east on north line of right of way of St. Louis, Kansas City and Northern railroad to west line of Ranken avenue, and thence north on west line to beginning.

Part of a seven-acre piece of land, belonging to Missouri Pacific railroad, situated between Cabanne and Vandeventer avenues, beginning at the northeast corner of said piece in the middle of Mill creek, thence south parallel to Cabanne street 140 feet along land of William G. Webb; thence west in continuation and projection of north line of Laurel street 425 feet along the remaining land of the Missouri Pacific railroad; thence north and parallel to Vandeventer avenue 135 feet along the land of Thomas Brook to southwest corner of said 7-acre tract; thence east parallel with south line as
483 hereinbefore described 261 feet to point middle Mill creek; thence east to center of said creek along the lines of said Thomas Brooks and E. Neuer to beginning, except such portions of such tract heretofore conveyed by St. Louis County Railroad Company to St. Louis, Kansas City and Northern railroad, Book 526, page 324.

Parts of lots 4 and 5 of sub-lot 7, 4th series, Chouteau Mill tract, beginning 55 feet north of intersection of Laurel street, produced to east line of land of Brooks, thence in northwest course 236 feet to point on the west line of Brooks about 194 feet south of the south line of Manchester road; thence north along said west line 90 feet to a point; thence southeast parallel to said northwest course 449 feet to southeast corner of land of Brooks, adjoining southwest corner of land of E. Neuer; thence west and parallel to prolonged line of Laurel street 213 feet to northwest corner of

land formerly belonging to Missouri Pacific railroad; thence south about 76 feet 6 inches to beginning, except such portions conveyed, Book 526, page 324.

Part of survey 1657, containing $\frac{44}{100}$ acres, more or less, beginning in the north line of said survey at the northwest corner of Musick's Addition, thence west along the north line of said survey 429 feet, more or less, to property of L. A. Labeaume; thence south along his east line 45 feet to a point; thence east parallel to north line of said survey 45 feet south of same 429 feet, more or less, to west line Musick's Addition; thence north along said west line 45 feet to the beginning, bounded north by the north line of said survey, east by west line Musick's Addition, south by Ohio, and west by Labeaume, being 45 feet in width off the north side of land acquired by Ohio from Mumford January 24, 1868.

Piece land same survey 1657, section 7, 45 west of R. 7 E., in St. Louis county, having a length from east to west of 435 feet 3 inches, more or less, and a width from north to south of 45 feet, bounded north by north line of said survey, east by line parallel to and 429 feet, more or less, west of west line of Musick's Addition, south by a line parallel with and 45 feet south of said north line of survey, and being a strip 45 feet in width of the entire northern end of tract of land in St. Louis owned by L. A. Labeaume.

A rectangular strip of land in the 13th ward, in survey 1332, bounded north by remaining portion of the whole piece belonging to John M. Harney, fronting on south side of Bates avenue, east by Boyce, south by McCune and Dougherty, and west by De Thury, said strip being 309 feet long from east to west by 25 feet in depth.

484 All that rectangular strip in 13th ward, city of St. Louis, south part of larger piece belonging to Christian De Thury, bounded north by remainder of said larger piece (which is bounded north by Bates avenue), east by Harney, south by McCune and Dougherty, west by De Noue, being 250 feet long from east to west and 25 feet in depth.

Strip of land 25 feet in width along south boundary line of Octavia Boyce, on Bates avenue between King's highway and Vandeventer avenue.

Strip of land 25 feet wide extending from northeast corner of land of McCune and Dougherty north 81 degrees west along north line of said McCune's land a distance of 77 feet, thence on a strip 40 feet wide embraced in parallel lines equally distant from a center line, beginning at the northwest corner of above-described strip and running west by a course bearing southward, having a radius of 2,365 feet for a distance of 400 feet; thence by a straight line south 89 degrees 10 minutes west for a distance of 135 feet; thence by a curve northward, having a radius of 1,287 feet, a distance of 395 feet, and thence by a straight line north 73 degrees 50 minutes west for a distance of 210 feet to King's highway, upon lands situated on King's highway between Bates avenue and Clayton road—a strip of land 25 feet wide along the entire south boundary of

Helen J. Clemens' land, situated on Bates avenue, joining the property of Julia J. Thomas on the west.

A strip of land 40 feet wide over and across Cabanne's dairy farm, the center line of which begins at King's highway 20 feet north of the southeast corner of said land and running along parallel to south line thereof 825 feet; thence by a curve 1,170 feet long bearing northwest with a radius of 1,903 feet: thence by a line bearing north 55 degrees west about 1,090 feet to Union avenue, not less than 487 feet south of northeast corner of R. Forsyth's land.

A strip of land 40 feet wide over and upon the lands of R. Forsyth in Central township, St. Louis county, beginning on Union avenue by and upon a strip of land 40 feet wide equally divided, 20 feet on each side of a central line 480 feet south of northeast corner of said land; thence northwest to the line between J. W. Kingsbury and R. Forsyth, about 1,055 feet west of Union avenue; thence on a strip 30 feet in width along the north line of said land due west to point about 978 feet west of Skinker road.

Strip 40 feet in width across the northwest corner of said Forsyth's land, center line of which beginning 1,578 feet east of
485 northwest corner of said land, running in a southwest direction to point 243 feet north of southwest corner of said R. Forsyth's land.

All that strip of land in city of St. Louis, 30 feet wide, commencing about 1,055 feet west of Union avenue and running west along south boundary of said property hereinbefore described across the Skinker road to a point between Skinker road and the water-course, which said water-course crosses the dividing line between the lands of Kingsbury and Forsyth about 800 feet west of said Skinker road, and from said point between said Skinker road and water-course a strip of land 40 feet wide, with sufficient land for the slopes of the cut and fills in the construction of a railroad across said water-course; thence between said water-course and the dividing line between said estate of Kingsbury and Forsyth land to northwest corner of Prouhet's land, said water-course being crossed again by said strip near the northeast corner of said Prouhet's land, and thence by a strip 30 feet wide along south boundary line of said James W. Kingsbury, adjacent to land of said Prouhet, for a distance of about 2,650 feet.

Part of the estate of James W. Kingsbury, a strip of 30 feet wide, commencing 1,055 feet west of Union avenue and running west along south line of said Kingsbury estate across the Skinker road to a point between the said Skinker road and said water-course, which water-course crosses the dividing line between said estate and the estate of Forsyth 800 feet west of Skinker road, and from said point between Skinker road and water-course a strip of land 40 feet wide across said water-course, and thence between it, the said water-course, and the dividing line between said estate and Forsyth land to northeast corner of Prouhet's land—said water-course is crossed again near the northeast corner of said Prouhet's land; then a strip of land 30 feet wide along south boundary line of said estate, adjacent to the land of Prouhet, a distance of 2,650 feet.

To secure 4 notes of even date—
1 for $12,500.00 at 3 years at Third National Bank.
1 for $1,250.00 at 3 years.
1 for $1,250.00 at 2 years.
1 for $1,250.00 at 1 year.

486 George S. Grover and wife, Maggie C. Grover, to the St. Louis, Kansas City and Northern Railway Company.

December 24, 1878; consid., $1.00; recorded December 26, 1878, in Book 608, page 45; acknowledged at the city of St. Louis, Missouri, December 24, 1878, before James P. Williams, notary public.

Same land embraced in above deed of trust, it being the intention of the party of the first part to convey to second party of this deed all and every part and parcel of the real estate conveyed to first party by Haeussler and wife by deed December 23, 1878, saving and excepting a tract of land conveyed to Edward Walsh, Jr., by first party by deed December 24, 1878.

Special warranty *vs.* grantors.

GEO. S. GROVER. [SEAL.]
MAGGIE C. GROVER. [SEAL.]

487 EXHIBIT E.

In the Circuit Court of the United States, Eastern District of Missouri.

CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*, Defendants; City of St. Louis and The St. Louis, Kansas City & Colorado Railroad Company, Intervenors. } In Chancery. Consolidated Cause. Master's No., 279.

It is hereby stipulated that said St. Louis, Kansas City & Colorado Railroad Company duly located its line of road in the city of St. Louis on the — day of May, 1886, and that said line crosses said Wabash, St. Louis & Pacific railway at Forsyth junction, in said city, thence along and adjoining the north side of the right of way of said Wabash, St. Louis & Pacific railway to the northern line of Forest park, in said city, and on the — day of August, 1886, proceeded to condemn a right of way forty feet wide on said line were duly filed in the circuit court of the city of St. Louis by said St. Louis, Kansas City & Colorado Railroad Company against the owners of the land between Forsyth junction and the northern line of said park, and such proceedings are now pending.

It is further agreed and stipulated that there shall be deemed and considered in evidence in this cause so much of the record in the principal cause, entitled "The Central Trust Company of New York

et al. vs. The Wabash, St. Louis & Pacific R'y Co. *et al.*," as either party may consider relevant to the issue herein.

NOBLE & ORRICK,
Solicitors for Intervenors.
H. S. PRIEST,
For Defendants.

488 EXHIBIT F.

STATE OF MISSOURI, *ss:*

I, Michael K. McGrath, secretary of state of the State of Missouri, hereby certify that the annexed pages contain a full, true, and complete copy of the articles of association of "The Saint Louis County Railroad Company," with the affidavits of three of the directors of said company attached thereto, filed August 25, 1871, as the same appears on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of office of the secretary of state. Done at the city of Jefferson this nineteenth day of May, A. D. eighteen hundred and eighty-one.

[SEAL.]

MICH'L K. McGRATH,
Secretary of State.

Know all men by these presents that in order to form an incorporated company for the purpose of constructing, maintaining, and operating a railroad for public use in the conveyance of persons and property under the general statutes of the State of Missouri relative to corporations, we, the undersigned subscribers for the stock of said company, do make and sign the following articles of association:

First. The name of the company shall be "The Saint Louis County Railroad Company."

Second. This company shall continue in existence for the term of nine hundred years.

Third. The places from and to which the railroad of this company is to be constructed, maintained, and operated are as follows: From the city of Saint Louis to some point on Creve Cœur creek, in the township of Bonhomme, in the county of Saint Louis.

Fourth. The length of the said railroad is estimated to be sixteen miles, and it is intended to be made and constructed through the county of St. Louis.

Fifth. The amount of the capital stock of this company shall be two hundred thousand dollars, to be divided into two thousand shares of one hundred dollars each.

489 Sixth. The affairs of this company shall be managed by a board of five directors whose qualifications, powers, and duties shall be as provided by the general statutes of the State of Missouri, under which this organization is made, and the code and by-laws that may be adopted by the company.

Seventh. The names and places of residence of the directors who

shall manage the affairs of this company for the first year and until others are chosen in their places — as follows:

Jonathan Jones, president, Central t'p, St. Louis Co., Mo.
Tho. Skinker, Central township, St. Louis Co.
Edward Burgess, Central township, St. Louis Co.
W. Marsh Kasson, Paterson, New Jersey.
Joseph Shippen, secretary, St. Louis.

In witness whereof we have hereunto set our hands, stating our residence and the number of shares of stock subscribed by each of us, respectively, this twenty-first day of August, in the year of our Lord eighteen hundred and seventy-one.

Names.	Residences.	Shares.
Jonathan Jones	Central township	20
Edward Burgess	Central township	20
Joseph Shippen	St. Louis	20
Wm. T. Mason	St. Louis	10
W. Marsh Kasson	Paterson, N. J.	20
Tho. Shinker	Central township	20
Joseph Shippen	St. Louis	20
W. Marsh Kasson	Paterson, N. J.	20
Edward Burgess	St. Louis, Mo.	20

STATE OF MISSOURI, }
City of St. Louis. }

Edward Burgess, W. M. Kasson, and Joseph Shippen, three of the above-named directors of "the St. Louis County Railroad Company," being duly sworn according to law, do say that the amount of stock required by law, to wit, the sum of sixteen thousand dollars, has been (in good faith) subscribed and five per cent. paid in cash thereon as aforesaid, and that it is intended in good faith to construct, maintain, and operate the railroad mentioned in the above articles of association.

EDWARD BURGESS.
W. MARSH KASSON.
JOSEPH SHIPPEN.

490 Sworn and subscribed this twenty-fourth day of August A. D. 1871, before me—

H. D. LAUGHLIN,
[SEAL.] *Notary Public, St. Louis County, Mo.*

Filed August 25, 1871.

EUGENE F. WEIGEL,
Sec'y of State.

Certificate of corporate existence issued June 2d, 1873.

EUGENE F. WEIGEL,
Sec'y of State.

491 EXHIBIT G.

[U. S. stamp, 50c. W. D. G. Nov. 20, 1871.]

Whereas I, W. D. Griswold, am the owner of what is known as the Cabanne dairy farm, which I lately bought of John C. Cabanne, know all men by these presents that I hereby consent that the St. Louis County Railroad Company may locate, construct, and maintain its railroad across and over said land on a right of way forty feet in width, the center line of which begins at King's highway twenty feet north of the southeast corner of said land and running along parallel to the south line thereof eight hundred and twenty-five feet; thence by a curve eleven hundred and seventy feet long bearing northwest with a radius nineteen hundred and three feet; thence by a line bearing north fifty-five degrees west about ten hundred and ninety feet to a point on Union avenue not less than four hundred and eighty-seven feet south of the northeast corner of Robert Forsyth's land, and the right of way hereby granted to said railway company shall be forty feet in width through said land for the location, construction, and maintenance of its railroad, and for that use and purpose only. This license to operate in perpetuity of the said St. Louis Railroad Company, its successors and assigns, shall continue to maintain and operate their railroad and to cease with their non-use of the same for such purpose, and this agreement is made in consideration of one dollar received from said railroad company and that its railroad shall be constructed, operated, and maintained, and is granted subject to the condition that the same shall be so built, maintained, and operated, and also on my demands they shall make good fences along same on each side through the said farm and make proper cattle-guards where the same shall enter and leave the same; and, further, that in building said road they shall make no excavations along the sides of the track for embankment to deform the surface and be offensive. I consent further that in building the embankment, if the
492 forty feet aforesaid shall not be sufficient to enable the company to complete the same to their satisfaction, the toe of such embankment may be run over to my adjoining land without objection, and also *if* in the cutting for the line of road, if necessary, they may extend the slope of the cut beyond the limit of the forty feet aforesaid, as may be necessary or convenient.

Witness my hand and seal this third day of November, A. D. 1871.

[SEAL.] W. D. GRISWOLD.

Attest:
H. P. BUXTON.
W. MARSH KASSON.

STATE OF MISSOURI, } *ss:*
County of St. Louis, }

I, J. C. H. Cunningham, a justice of the peace in and for said county of St. Louis, do certify that on this twentieth day of Novem-

ber, A. D. 1871, came before me W. Marsh Kasson, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as a witness to the same, and, being by me first sworn, saith that he was present and saw W. D. Griswold, who is named in said deed as a party thereto and whose name is thereto subscribed, execute the same, and heard him acknowledge the same to be his act and deed for the purposes therein mentioned, and that thereupon the said W. Marsh Kasson subscribed his name to said instrument as a witness thereof.

Given under my hand the day and year last above mentioned.

JOHN C. H. CUNNINGHAM,
Justice of the Peace.

Filed and recorded December 5, 1871.

W. C. KENNETT, *Recorder.*

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

I, the undersigned, recorder of deeds, certify the foregoing to be a true copy of an instrument of writing executed by W. D. Griswold, together with the acknowledgment and date of filing and recording thereof, as the same appears of record in my office in Book 443, page 96.

Witness my hand and official seal this 16th day of February, 1878.

[SEAL.] D. H. MACADAM, *Recorder.*

493 EXHIBIT H.

This agreement, made this twenty-ninth day of October, A. D. 1872, by and between the commissioners of Forest park, as a body corporate of the city and county of St. Louis and State of Missouri, parties of the first part, and the St. Louis County Railroad Company, of the State aforesaid, party of the second part, witnesseth:

That for and in consideration of one dollar to them in hand paid and of the covenants hereinafter to be performed by the party of the second part said Forest park commissioners hereby grant and will convey or cause to be conveyed to said railroad company a free right of way seventy feet wide through the said Forest park, according to the blue line on a map accompanying this agreement, being the same designated and agreed upon by John Withnell, Joseph O'Neil, and H. W. Leffingwell on behalf of said railroad company; and in consideration of one dollar to them in hand paid and of the covenants hereinafter to be performed by the said parties of the first part said railroad company hereby relinquish and shall cause to be conveyed to said park commissioners that portion of the right of way heretofore obtained by them from W. D. Griswold within the limits of the said park, and it is further mutually covenanted and agreed by and between the parties hereto as follows, to wit: First, that said railroad company shall construct its tracks in a good and substantial manner and shall cover the same with tunnels under East avenue and under North avenue. Said tunnels shall be so con-

structed as not to require a rise of over eight feet above the grade, when established, of East and North avenues, provided that the grade of North avenue shall not be established below the present surface of the ground where it is crossed by said railroad. Said railroad company shall also fence and keep fenced that portion of its tracks within the park which are not covered by tunnels in a manner satisfactory to said park commissioners, and shall complete all of said tunneling and fencing on or before the first day of January, A. D. 1874. Said railroad company further agree to extend their track eastward to Eighteenth street (Tayon avenue) within two years from this date. Second, said Forest park commissioners
494 agree to grant to the use of said railroad company a space of ground seven hundred feet in length by one hundred feet wide on the line of said railroad, including the seventy feet already given, for the purposes of a passenger depot within the park, which said depot shall be constructed in a style in harmony and keeping of said park when improved. Third, said railroad company shall pay over monthly to said park commissioners one cent on every fare collected on visitors to or from St. Louis and said park depot, or one cent and a half for every round-trip ticket to or from St. Louis and said park depot. Fourth, and said park commissioners agree that out of the amount thus collected and when received by them they shall pay to said railroad company twenty-five thousand dollars as a consideration for the tunneling and extra grading required by the aforesaid agreement, and the amount that may be received by said commissioners from the aforesaid payments shall be set apart and paid over quarterly to said railroad company until the whole sum of said twenty-five thousand dollars is paid. Fifth, said park commissioners further agree to exact from all railroads and other conveyances carrying passengers for hire to or from St. Louis and said park to whom said commissioners shall grant any privilege within the park the same amount required as above specified to be paid by the said St. Louis County Railroad Company. Sixth, it is also further mutually provided and agreed that said park commissioners may at any time hereafter cause the grade and route of said road through said park to be changed at the expense of said park commissioners: Provided, however, that said change shall not cause any sharper curves in the line of said road than those designated by the blue line aforesaid, nor that shall impair the right and privileges hereby granted or lessen the value thereof to said railroad company. Seventh, and it is further provided and agreed that said railroad company shall, from time to time, make such regulations *as* for the running of cars and the railroad operations within said park as may be necessary and proper for the safety and convenience of passengers and visitors thereto, and the property and privileges hereby granted to said railroad company shall be enjoyed in such manner as not to mar, injure, or destroy the purposes for which said park was established; and it is further stipulated that over and upon the right of way hereinbefore granted the said railroad company shall have the full power and control as to the running of trains, laying tracks, and all railroad operations

thereon, and said park commissioners reserve to themselves
495 the same general jurisdiction for police and park purposes as over the other portions of the park.

In witness whereof the said parties, by resolutions of their respective boards of directors, have caused their respective corporate seals to be hereunto attached and attested by their respective presidents and secretaries the day and year first above mentioned.

LEVIN H. BAKER, *President.*

[Seal Forest Park.]

CHAS. BLAND SMITH, *Secretary.*

THE SAINT LOUIS COUNTY RAILROAD COMPANY.

JONATHAN JONES, *President.*

[Seal St. L. Co. R. R. Co.]

Attest: JOSEPH SHIPPEN, *Secretary.*

STATE OF MISSOURI, } ss:
County of St. Louis, }

Be it remembered that on this fifth day of December, A. D. 1872, before me, the undersigned notary public within and for the said county, personally appeared Levin H. Baker, president, and Charles Bland Smith, secretary, of the commissioners of Forest park, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as president and secretary of the commissioners of Forest park, party thereto, and who affixed thereto the seal of said corporation, and severally acknowledged that they executed the same as the act and deed of said corporation for the purposes therein mentioned; and also personally appeared Jonathan Jones, president, and Joseph Shippen, secretary, of the St. Louis County Railroad Company, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as president and secretary of the St. Louis County Railroad Company, party thereto, and who affixed thereto the seal of said corporation, and severally acknowledged that they executed the same as the act and deed of said corporation for the purposes therein mentioned.

496 Witness my hand and official seal the day and
[SEAL.] year above named.

THOMAS HUNTINGTON,
Notary Public.

Filed and recorded Dec. 5th, 3.52 p. m., 1872.

W. C. KENNETT, *Recorder.*

STATE OF MISSOURI, } ss:
City of St. Louis, }

I, the undersigned recorder of deeds for said city, certify the foregoing to be a true copy of an instrument of writing executed by the Forest park commissioners and the St. Louis County Railroad Company, together with the acknowledgment, date of filing and recording thereof, as the same remains on record in my office in Book 464, page 197.

Witness my hand and official seal this 30th day of July,
[SEAL.] A. D. 1886.

THOS. F. FARRELLY, *Recorder.*

EXHIBIT.

STATE OF KANSAS, OFFICE OF SECRETARY OF STATE.

I, James Smith, secretary of state of the State of Kansas, do hereby certify that the following and annexed is a true and correct copy of the original instrument of writing filed in my office December 20, 1884.

In testimony whereof I have hereunto subscribed my
[SEAL.] name and affixed my official seal. Done at Topeka, Kansas, this 20th day of December, 1884.

JAMES SMITH,
Secretary of State.
By W. T. CAVANAUGH,
Assistant Secretary of State.

UNITED STATES OF AMERICA, }
State of Kansas. }

Be it remembered that we, the undersigned, Francis Tiernan and W. Chenawalt and W. H. Stout, citizens and residents of the State of Kansas, and E. R. Stewart, of the State of Ohio, and L. M. Potter, of the State of Ohio, and Robert Popkess, of the State of
497 Kansas, and W. S. McWilliams, of the State of Kansas, do hereby associate ourselves for the purpose of forming a railroad corporation under the laws of the State of Kansas, and now herein set forth the charter of said corporation as follows:

First. The name of the corporation herein and hereby created is and shall be the "St. Louis, Kansas City and Colorado Railroad Company."

Second. The purposes for which this corporation is formed are to construct, maintain, equip, acquire, own, and operate a railway or railroad in the State of Kansas and a telegraph line in connection therewith, commencing at the western line of Seward county, State of Kansas, near the center of said line, thence eastwardly through the counties of Seward, Ford, Comanche, Barber, Harper, Sumner, Cowley, Chautauqua, Elk, Wilson, Neosho, Crawford, Bourbon, and Linn, in the State of Kansas, and to a point in the eastern line of said Linn county, near the center of said line, and, by virtue of the laws of the State of Kansas and those of the State of Missouri, to construct, maintain, equip, acquire, own, and operate said line of railway and telegraph into and through the State of Missouri, extending eastwardly from said point in the eastern boundary line of Linn county, State of Kansas, through the counties of Vernon, Bates, Henry, Johnson, Cass, and Jackson, in the State of Missouri, to the Union depot in Kansas City, in said State of Missouri; and, furthermore, from the point where the said railroad runs northwestwardly to Kansas City, State of Missouri, eastwardly through the counties

of Henry, Benton, Morgan, Miller, Cole, Osage, Maries, Gasconade, Franklin, St. Louis, and to and into the city of St. Louis, State of Missouri, to, through, and along by the Union depot to the west bank of the Mississippi river, at said city of St. Louis, with all necessary branches, side tracks, switches, depots and depot grounds, and usual conveniences and appurtenances in said Kansas City and the city of St. Louis and on and along the whole line of the said railroad, and another portion of said railroad commencing in the western line of the county of Chase, at or near the center of said western line, thence eastwardly through the counties of Chase Lyon, Coffey, Anderson, and Linn, in the State of Kansas, to a point in the eastern line of said county of Linn, at or near the center of said line; thence eastwardly into the county of Bates, in the State of Missouri, to the point at or near the same where the said railroad runs eastwardly to said city of St. Louis, and by means of said railroad and appurtenances transport persons and prop-
498 erty for compensation and hire and by said telegraph line to aid in the operation of said railroad and to transmit messages and information for compensation and reward, and this corporation shall have all the rights, powers, privileges, and franchises that may belong or be incident to any railroad corporation created and organized under the laws of Kansas, and also may acquire and hold all the railroad, property, and franchises which may at any time be obtained by it or conveyed to it by any persons or by any railroad company or other corporation, and have the further power to purchase, lease, acquire, construct, maintain, and operate any railroad, railway branches, railroad connections, or railroad property, or telegraph line or lines which it may at any time have or acquire by the purchase or acquisition of any railroad or telegraph company, franchises, or otherwise, and may extend its road and exercise its powers in any other State or Territory authorizing or allowing it so to do, and as by the statutes, law, and usage of said other State or Territory it may have the right, privilege, or license to do.

Third. The kind of road intended to be constructed is a standard-gauge railroad.

Fourth. The estimated length of the railroad is eight hundred and fifty miles.

Fifth. The business of this corporation shall be transacted at its general office, which shall be located at the city of Fort Scott, State of Kansas, and at Kansas City and St. Louis, Missouri, and the city of New York, State of New York.

Its board of directors may appoint subordinate stations and places of business, as usual for railroad companies.

Sixth. This corporation shall exist for a term of twenty-nine years from the date of the filing of this charter in the office of the secretary of state of the State of Kansas.

Seventh. The capital stock of this corporation is and shall be twenty million dollars, divided into two hundred thousand shares, each of the par value of one hundred dollars.

Eighth. The number of directors of this corporation shall be

seven, and the said Francis Tiernan, W. Chenault, W. H. Stout, E. R. Stewart, L. M. Potter, Robert Popkess, and W. S. McWilliams, whose respective places of residence are hereinbefore specified, are hereby appointed the directors of this corporation for the first year.

In witness whereof we, the undersigned, being all of the
499 above-named persons, have hereunto set our hands and seals this twentieth day of December, A. D. 1884.

FRANCIS TIERNAN. [SEAL.]
W. CHENAULT. [SEAL.]
W. H. STOUT. [SEAL.]
E. R. STEWART. [SEAL.]
L. M. POTTER. [SEAL.]
W. S. McWILLIAMS. [SEAL.]
ROB'T POPKESS. [SEAL.]

STATE OF KANSAS, } *ss:*
County of Bourbon, }

Be it remembered that on this twentieth day of December, A. D. eighteen hundred and eighty-four, before me, a notary public in and for said county, personally came Francis Tiernan and Walter Chenault and W. H. Stout and E. R. Stewart and L. M. Potter and W. S. McWilliams and Rob't Popkess, to me personally known to be the same persons who executed the above and foregoing instrument of writing, and they severally acknowledged the same to be their voluntary act and deed for the purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my official seal the day and year last above written.

My term expires December 10th, 1887.

[SEAL.] JAMES M. STANLEY,
Notary Public.

EXHIBIT —.

It is stipulated and agreed between the parties hereto as follows:

First. That the several lots or tracts of land indicated in red on chart "A" and marked "Grover" were obtained by the St. Louis, Kansas City and Northern R'y Co. through the several conveyances mentioned in the certificate of the "Sterling and Webster Abstract Co.," which certificate is admitted in evidence and marked "Exhibit D."

Second. It is admitted that the several lots and tracts of land now constituting the defendants' right of way between Forest park and the Union depot not indicated in blue or marked "Grover" on chart "A" were obtained by the St. Louis, Kansas City and
500 Northern R'y Co. from divers persons by purchase and condemnation, as stated in defendants' answer, but as to the cost thereof no admissions are intended to be made by the parties.

NOBLE & ORRICK,
Solicitors for Intervenors.
H. S. PRIEST,
For Defendants.

Correspondence.

WABASH, ST. LOUIS AND PACIFIC RAILWAY,
ST. LOUIS, MO., *February* 17, 1885.

Messrs. Noble & Orrick, St. Louis.

GENTS: In reply to your inquiries in respect to the terms on which the Forest park and Central R. R. Co. may acquire the use of the Wabash tracks between Forsyth Jct. & Union depot, I wish to say that we have had some talk concerning the matter with the receivers, and they do not feel that any arrangement they could make would be binding on the Wabash Co. in case it should resume possession and management of this property, or upon its successor if there should be a sale of its property under any of its mortgages.

I wish also to state that while we are advised by our attorney that your Co. has not, in his opinion, any right to demand the use of any tracks or property of the Wabash Co. on account of anything contained in the contract of August 11, 1875, between the commissioners of Forest park, the St. Louis Co. R. R. Co., and St. L., K. C. & N. R'y, yet I consider the discussion of that question unnecessary at this time, as I feel satisfied, from the views expressed by the receivers, that as far as it could be done without prejudice to the interest of the road that they would be willing to make satisfactory arrangements with you for the use of their track into St. Louis from Forsyth Jct. upon fair and equitable terms. How far these facilities could be granted to you without interfering with the business of our road and what compensation should be allowed for such facilities as we can extend to you is a matter concerning which the receivers would wish the opinion of Mr. Talmage, the general manager of the road, and when your people are ready to act I would suggest
501 that they submit their proposition in writing to Mr. Talmage for his consideration and recommendation.

Yours truly,

J. A. MCARTHUR,
General Agent.

(Copy.)

FEBRUARY 4, 1886.

Messrs. Noble & Orrick, attorneys-at-law, St. Louis, Mo.

GENTLEMEN: We beg leave to acknowledge the receipt of your communication of yesterday in relation to rates on construction material from Union depot to Forsyth junction quoted by Mr. Talmage to Mr. Drew.

In reply we beg leave to say that the question is one we consider Mr. Talmage quite competent to deal with, and we trust all differences may be amicably adjusted between him and Mr. Drew.

We wish to say further, however, that so long as we remain in charge of the Wabash property as receivers we shall demand and endeavor to collect from Mr. Drew whatever rate is given him on his material by Mr. Talmage, provided it is within the maximum limit fixed by the statute of the State. Our duty to the creditors of

the Wabash Company require this, and we shall, if necessary, apply to the court for leave to take whatever steps are necessary to protect their rights.

Very respectfully yours,

SOLON HUMPHREYS AND
THOMAS E. TUTT,
By JAMES F. HOW,
General Agent.

ST. LOUIS, *February* 5, 188–.

Messrs. Thomas E. Tutt and Solon Humphreys, receivers of the Wabash, St. Louis & Pacific R. R., J. F. Howe, agent.

GENTLEMEN: Since the receipt of your reply to ours of the 3d inst., relative to proposed charges for Mr. Drew's freight, we have gone over the figures again, and are now satisfied that Mr. Talmage and ourselves made a mistake in our figuring.

When Mr. Orrick was with Mr. Talmage, Mr. T. figured on the amount per car at the rate given, whatever it was, and he made it $17.90 per car. This was done hurriedly in the office, and we left him supposing that was the amount to be paid per car. We have since made a calculation ourselves, and find that at the rate given ($17.90) per car is incorrect.

502 We figured, say, on 30,000 pounds to a car at 4-cent rate would be $12 instead of $17.90 for the railroad iron and lumber. This, as you will see, is much less than $17.90, or a difference of $5.90 per car. We write this in explanation of our former letter, not desiring to do injustice, and correct a mutual mistake.

While we think under the circumstances, your company could well afford to give Mr. Drew a less rate, we do not question your right to charge the rate authorized by law, provided you charge other parties the same rate.

We have never questioned Mr. Talmage's ability to manage the Wabash property, but suggest that our letter to you was caused by a mistake in his figures given to us in the presence of Mr. Drew, of which I suppose he still has a memorandum.

Yours very truly, NOBLE & ORRICK.

ST. LOUIS, *May* 17, 188–.

James F. How, Esq., general agent receivers W., St. L. & P. R'y Co., city.

DEAR SIR: You may remember that during last year we had some correspondence with you relative to arrangements for the use of the right of way and tracks of your company between Forsyth junction and Union depot by the St. Louis, Kansas City & Colorado Railroad Company, and that correspondence closed on February 17, last year, with a letter from you to us on the subject, a copy of which we herewith enclose, in which you state when our people are ready to act that we submit a proposition, &c. Our road is now about completed to Creve Cœur Lake, and we are ready to negotiate for the use of your tracks, &c., between the points named.

Our company is willing to pay to your company a reasonable compensation for what they want, and we suggest that a conference be had at once between the respective parties with a view of arriving at a basis of an agreement. We have thought it might be well for our engineer, Mr. Emerson, to be present, together with yours, and, of course, yourself, and any others you might suggest, to aid to a more perfect understanding of the situation and what was wanted.

Will you please fix a time when we can have such conference, and oblige,

Yours very truly, NOBLE & ORRICK,
Att'ys for St. L., K. C. & C. R. R. Co.

503 (Copy.)

ST. LOUIS, *May* 18, 1886.

Messrs. Noble & Orrick, attorneys for St. L., K. C. & C. R. R. Co., St. Louis.

GENTLEMEN: In reply to your letter of May 17 I will state that, as it is the expectation that the reorganized Co. will at no very distant date take possession of this property, we do not feel that we are justified in making other than a temporary agreement with your road for handling its business between St. Louis and Forsyth Jct.

If Col. Emerson, or whoever has the matter in charge for you, will call upon Mr. Talmage he will be glad to consider with him the terms of such a temporary arrangement.

Yours truly, JAMES F. HOW,
General Agent.

ST. LOUIS, *July* 2, 188–.

Solon Humphreys, Thomas E. Tutt, receivers Wabash, St. Louis & Pa. R'y Co., Jas. F. Howe, agent.

GENTLEMEN: We have heretofore addressed you two communications in behalf of the St. Louis, Kansas City & Colorado Railroad Company, with a view to come to some understanding with you as to the use of the right of way of the Wabash, St. Louis & Pacific Railway Co. through Forest park and up to the terminus of your road in the city of St. Louis, but have been unable as yet to accomplish anything or come to an understanding. We were referred by Mr. How, your agent, to Mr. Talmage, the general manager of the road, and a conference was had with Mr. Talmage by officers of our company, and they were finally informed by Mr. Talmage that our road under no circumstances could use this right of way upon any terms; that he would not permit us to put our engines on the track or use your right of way with our engines through the park and to the terminus of your road in the city of St. Louis. We have deemed it advisable to again call your attention to this matter. On the 11th of August, 1875, an agreement was entered into between the commissioners of Forest park, the St. Louis County railroad, and the St. Louis, Kansas City & Northern Railway Co., of which latter company the Wabash, St. Louis & Pacific Railway Company is suc-

cessor and assignee. This contract, in our view, requires your company to permit the St. Louis, Kansas City & Colorado R. R. Co. to use the right of way of the Wabash, St. Louis and Pacific R.
504 R. Co. through Forest park up to the terminus of its road into the city of St. Louis upon such terms and for such fair and equitable compensation to be paid to it therefor as may be agreed upon by said companies last named.

We claim that the term "other railroads" gives to our company the right to avail itself of the provisions of this contract as to the use of your right of way, as above stated, under the terms of this tripartite agreement: Our road is now completed to Creve Cœur Lake, and forms a junction with your road at Forsyth, near the park. Having been unable up to this date to come to any agreement for the use of your right of way, as above stated, we have been unable to operate our road. We are suffering great damage and loss every day now by reason of your failure and refusal to permit our company to use said right of way. We are willing to pay your company a fair and equitable compensation for its use, and we write now to inquire whether you are disposed to recognize our rights as we interpret them under this tripartite agreement to the use of said right of way and to receive from us such fair and just compensation.

We await your early reply.

Yours very truly, NOBLE & ORRICK,
Att'ys for St. Louis, Kansas City & Colorado Railroad Co.

(Copy.)

ST. LOUIS, *July* 3, 1886.

Messrs. Noble & Orrick, att'ys for St. L., K. C. & Col. R'y.

GENTLEMEN: Yours of July 2 is received. The receivers, acting under the advice of their counsel, are not disposed to admit that the St. Louis, K's City & Col. R'y has rights under the tripartite agreement of August 11, 1875, as claimed by you.

But as their possession of this property is only temporary they are willing, as has been repeatedly stated to you, to make a temporary arrangement which will enable you to handle your business between Forsyth and St. Louis on fair and reasonable terms until such time as the reorganized company will have possession of the Wabash property, at which time you can negotiate with that company.

During the receivership, however, we will not consent to the running of independent engines or trains over our line through Forest park and to the Union depot under the management of any other company.

Yours truly, JAMES F. HOW, *Gen. Ag't.*

(Here follows exhibit marked p. 505.)

506 In the Circuit Court of the United States for the Eastern District of Missouri.

CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*, Defendants.	Consolidated Cause. Nos. 2357 and 2464. In Equity.

In the matter of the intervening petition of the City of St. Louis and the St. Louis, Kansas City & Colorado Railroad Company.

Petition of the Purchasing Committee to be Made Parties Defendant Herein, Filed December 31st, 1886.

506a Your petitioners, James F. Joy, Thomas H. Hubbard, Edgar T. Welles, and O. D. Ashley, respectfully represent that on the first day of June, A. D. 1880, the said Wabash, St. Louis & Pacific Railway Company, for the purpose of securing an intended issue of its mortgage bonds to the amount of fifty millions of dollars (to be known as "general mortgage bonds") and the payment of the principal and interest thereof, duly executed and delivered to the Central Trust Company of New York and James Cheney, of Indiana, as trustees, its mortgage or deed of trust (known as "the general mortgage"), and thereby conveyed to said trustees, for the purposes in said general mortgage fully set forth, certain lines of railroad and certain interests, as the same then existed or might thereafter exist, in and to certain other lines of railroad, with all the property and franchises, rights, incomes, and choses in action pertaining thereto.

That afterwards, on the 1st day of May, A. D. 1883, for the purpose of securing an intended issue of its bonds (called collateral trust bonds) amounting to ten millions of dollars, said Wabash Company executed and delivered to the Mercantile Trust Company of New York, as trustee, a certain other indenture called and known as "the collateral trust," and thereby assigned and transferred to said last-named company for the purposes of said trust all the bonds, stocks, cars, steamboats, rolling stock, and interest in real estate specified in said instrument, and then and there delivered all said bonds, stocks, and evidences of title to said trustee.

That petitioners, as trustees and as a "purchasing committee," purchased on the 26th day of April, 1886, certain premises, franchises, and property of the said defendant, The Wabash, St. Louis & Pacific Railway Company, at a sale made in pursuance of the decree of foreclosure of said general mortgage and collateral trust mortgage and sale entered in the above-entitled cause on the 6th day of January, 1886.

506b That among the premises, franchises, and property so purchased as aforesaid was all the right of way and railroad of said defendant company extending from the city of St. Louis, in said district, in a northwesterly direction to Kansas City, Missouri, with a lateral extension from Moberly, in the county of Randolph,

Missouri, to Ottumwa, in the State of Iowa, and a branch from Salisbury, in the county of Chariton, State of Missouri, to Glasgow, in said State of Missouri.

That the said line of road, prior to consolidation with the said defendant company, was known as the St. Louis, Kansas City & Northern railroad.

That on the 15th day of June, 1886, by decree of this court in the above cause, the sale aforesaid to your petitioners, as such trustees, was confirmed.

That on the 21st day of September, 1886, an order was made in the above-entitled cause directing Edmund T. Allen, the commissioner appointed by the court to make the aforesaid sale, to execute to your petitioners, as trustees, proper deeds to the property purchased as aforesaid, and also directing proper deeds to the interests in said property by them respectively held to be executed by said Central Trust Company of New York and James Cheney, trustees; the Mercantile Trust Company, trustee; the said Wabash, St. Louis & Pacific Railway Company, and Solon Humphreys and James F. How, trustees.

That your petitioners, as trustees, now own and hold, in pursuance of said sale, decree of confirmation, and deeds, an interest in the premises, franchises, and property of the said right of way and railroad hereinbefore described and formerly known, as aforesaid, as the St. Louis, Kansas City & Northern railroad.

506c Petitioners further represent that on the 12th day of July, 1886, the city of St. Louis and the St. Louis, Kansas City & Colorado Railroad Company filed in said cause its petition of intervention, and on the 4th day of August, 1886, their amended petition of intervention, and in said petition and amended petition prayed that a writ of injunction be issued by this court restraining said defendant company and Solon Humphreys and Thomas E. Tutt, receivers, and their agents from in any manner refusing to permit said petitioning company to use the right of way and to run its cars and engines upon and over the tracks upon the right of way of the said line of railroad hereinbefore described, as aforesaid, in the said city of St. Louis, between Union avenue, on the north line of Forest park, where said tracks enter said park, across said park to Eighteenth street, in said city.

That a hearing upon said amended petition and answer of said Central Trust Company and James Cheney, trustees, and said receivers was duly had before George H. Shields, special master *pro hac vice*, and exceptions to the report of said master filed by said trustees and receivers, and that final hearing has been had before said court upon the aforesaid pleadings, proof taken before said special master, report and exceptions thereto, and final decree entered by said court on the 13th day of December, 1886.

That by said final decree the right of said petitioning company to the use of said right of way and tracks thereon is adjudged and granted upon the terms in said decree set forth.

Petitioners further state that as trustees as aforesaid they have

an interest in said right of way and the subject-matter of
506*d* said litigation, and desire to protect and defend said interest by appeal from said final decree to the Supreme Court of the United States.

That petitioners were not made parties defendant to said petition or amended petition of intervention.

Petitioners pray that as trustees as aforesaid they may, by order of this court, be made parties defendant to said petition and amended petition, and that they may be allowed to adopt as their answer the answer aforesaid of said Central Trust Company and James Cheney, t :stees, and said receivers, and the exceptions filed as aforesaid to the report of said special master, and that they may be allowed an appeal from said final decree to the Supreme Court of the United States.

And, as in duty bound, they will ever pray, etc.

JAMES F. JOY,
THOS. H. HUBBARD,
EDGAR T. WELLES,
OSSIAN D. ASHLEY,
Purchasing Committee,
By WAGER SWAYNE,
Their Attorney.

507 In the Circuit Court of the United States for the Eastern District of Missouri.

CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*, Defendants.	Consolidated Cause. Nos. 2357 and 2464. In Equity.

In re intervening petition of the City of St. Louis and St. Louis, Kansas City & Colorado Railroad Company.

Order Making Purchasing Committee Parties Defendant Herein. December 31st, 1886.

And now, at this day, come James F. Joy, Thomas H. Hubbard, Edgar T. Welles, and O. D. Ashley and ask to be made defendants herein and to adopt the pleadings and exceptions heretofore filed in this case of intervention as their own; and it appearing to the court that said James F. Joy, Thomas H. Hubbard, Edgar T. Welles,
and O. D. Ashley are the owners, as purchasing committee and
508 trustees, of the premises, right of way, and franchises appurtenant thereto heretofore owned by the Wabash, St. Louis & Pacific railway between Union avenue, on the north line of Forest park, where said railway enters said park, and across said park to Eighteenth street, in the city of St. Louis, and over which the intervenor, the St. Louis, Kansas City & Colorado Railroad Company, are seeking by their petition of intervention to obtain the right to run their engines and cars—

It is therefore ordered that said James F. Joy, Thomas H. Hubbard, Edgar T. Welles, and O. D. Ashley be made parties defendant herein as purchasing committee and trustees as aforesaid, and that they shall be subject to all orders, judgments, and decrees entered or to be entered herein.

And at the time of the presentation of the application of said James F. Joy and others as aforesaid the intervenors aforesaid objected to the application or that the court grant the same; and the said objection was at the time overruled and said order granted notwithstanding.

(Signed) DAVID J. BREWER,
Circuit Judge.

509 In the Circuit Court of the United States for the Eastern District of Missouri. September Term, A. D. 1886.

CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*, Defendants.	Consolidated Cause. Nos. 2357 and 2464. In Equity.

The City of St. Louis and St. Louis, Kansas City and Colorado Railroad Company, intervenors.

Final Decree. December 31st, 1886.

This day came the City of St. Louis, Missouri, and the St. Louis, Kansas City & Colorado Railroad Company, intervenors herein, by their solicitors, John W. Noble and John C. Orrick, Leverett Bell, and John P. Ellis, and the defendants against said intervention, The Central Trust Company of New York and James Cheney (complainants in said consolidated cause); The Wabash, St. Louis &
510 Pacific Railway Company, defendants in said cause; Solon Humphreys and Thomas E. Tutt, receivers of said latter company, by their solicitors, Wager Swayne, Wells H. Blodgett, H. S. Priest, and Warwick Hough, and thereupon the cause on said intervention came on to be heard upon the reports (both that on preliminary and that on final hearing) of George H. Shields, Esq., special master *pro hac vice*, herein only appointed by this court and to whom this cause, under previous orders herein, was referred to ascertain and report the facts as well as his conclusions of the law, and also on the amended bill, answer, and replication, exhibits, documents, and evidence adduced, said reports bearing date July 24th and October 4th, 1886, respectively, and also upon exceptions taken to said reports on the part of the said defendants, The Wabash, St. Louis & Pacific Railway Company, Solon Humphreys and Thomas E. Tutt, receivers thereof, and The Central Trust Company of New York and James Cheney as trustees; and it appearing that the said exceptions, by consent of parties, are taken as duly filed in this court, as well as before the said master, and the said exceptions and said cause

having been argued by counsel and due deliberation had thereon, the court now orders, adjudges, and decrees that each of said exceptions of said defendants be disallowed and overruled, save and except that part of the eleventh exception which relates to the basis of compensation for use of right of way, and that said part of said eleventh exception be, and is hereby, sustained, and the said reports, save and except as aforesaid, are in all things hereby confirmed, and the court will determine the compensation and the basis therefor without further reference to the master.

And the court doth further find, order, adjudge, and decree that the equities are with said intervenors, and said intervenors are entitled to the relief as prayed for in their amended bill of complaint herein.

511 And the court finds, adjudges, and decrees that the basis of compensation to be paid by the intervenor, The St. Louis, Kansas City & Colorado Railroad Company, for the use of the right of way and tracks, side tracks, switches, turnouts, turn-tables, and other terminal facilities of said Wabash, St. Louis & Pacific Railway Company at and between the north line of Forest park and Eighteenth street, in the city of St. Louis, shall be the value of said right of way, tracks, and other property last described as determined by the master in his said reports, and the compensation to be paid shall be, per annum, six per cent. on one-half of the value of said right of way, tracks, side tracks, switches, turnouts, turn-tables, and other terminal facilities, and the said one-half value is and shall be taken to be $500,000, and that the intervenor, The St. Louis, Kansas City & Colorado Railroad Company, its successors or assigns, pay to said receivers, Solon Humphreys and Thomas E. Tutt, or their successors in interest, the sum of thirty thousand dollars per annum, in monthly installments of twenty-five hundred dollars each on the 15th day of each month so long as this decree remains in force, the first monthly installment to become due and payable thirty days after said railroad company, intervenor, shall have connected its tracks with that of the Wabash, St. Louis & Pacific Railway Company at the north line of said Forest park; all subsequent payments to be made from month to month during the lifetime of this decree.

And the court doth further find, adjudge, and decree that the expense per annum of maintaining the said right of way and other property pending such joint use thereof, including therein all taxes upon said property, shall be borne by the said Wabash, St. Louis & Pacific Railway Company and the said intervenor, The St. Louis, Kansas City & Colorado Railroad Company, in proportion *to* the number of wheels each of said companies shall cause to be

512 passed over the main track or parts thereof on said right of way per annum bears to the total number of wheels that both of said companies shall cause to be passed over the same during each year pending the said period of such joint use, and that this expense shall be paid at the expiration of each year. The said right of way and tracks thereon and other terminal facilities shall be maintained and kept in good repair by the Wabash, St. Louis & Pacific Railway Company.

And the court doth further order, adjudge, and decree that the running of all trains, engines, or cars of said intervenor, the said St. Louis, Kansas City & Colorado Railroad Company, over said right of way and tracks and the use of said right of way, road, terminal facilities, and other property specified as aforesaid shall conform to the rules and regulations now in force and such other reasonable rules and regulations as may hereafter be adopted by the said Wabash, St. Louis & Pacific Railway Company or its said receivers to enable said intervenor to fully enjoy the benefits of this decree, and that the trains of said railroad company, intervenor, shall be so regulated as that at least eight minutes shall, if deemed necessary, intervene between its trains and the trains of said Wabash, St. Louis & Pacific Railway Company at any point between said north line of Forest park and Eighteenth street, and that the sole control and regulation of the running of the trains of the said companies shall be under this decree in the Wabash, St. Louis & Pacific Railway Company and its receivers, and subject to the further order of this court.

And the court doth further order, adjudge, and decree that in all respects, subject to the terms of this decree, the said railroad company, intervenor, shall enjoy the equal use and benefit of said right of way, tracks, switches, side tracks, turnouts, turn-tables,
513 and other terminal facilities with said Wabash, St. Louis & Pacific Railway Company or its said receivers, and the said Wabash, St. Louis & Pacific Railway Company and Solon Humphreys and Thomas E. Tutt, as such receivers, and said Central Trust Company of New York and James Cheney and all persons claiming by, through, or under them and each of them respectively and their agents, servants, counsellors, and employees be, and the same are hereby, perpetually enjoined and restrained from in any manner refusing to permit the said intervenor, the said St. Louis, Kansas City & Colorado Railroad Company, its successors or assigns, and its or their officers, agents, or employees, from using with it or their engines, cars (loaded or empty), the said right of way, tracks, switches, side tracks, turnouts, turn-tables, and other terminal facilities of said Wabash, St. Louis & Pacific Railway Company between the north line of said Forest park and said Eighteenth street on the terms hereinabove set forth in this decree in and for the transacting of its or their business and in the operation of its or their road.

And the said intervenor, The St. Louis, Kansas City & Colorado Railroad Company, by its officers, agents, and employees and each of them, is hereby authorized and permitted, with its right of way, road, tracks and property, engines and cars, loaded or empty, to make connection with said Wabash, St. Louis & Pacific Railway Company at the north line of said Forest park and to use the said right of way, tracks, switches, side tracks, turnouts, turn-tables, and other terminal facilities of said Wabash, St. Louis & Pacific Railway Company or any one claiming by, through, or under it as to the same between the north line of said Park and Eighteenth street on the terms, in the manner, and subject to the regulations in this decree set forth in and for the transaction of the business and in operation

of the road of said St. Louis, Kansas City & Colorado Rail-
514–518 road Company, its successors or assigns, and said Solon Humphreys and Thomas E. Tutt, receivers, and all agents, servants, or persons by them engaged or acting with or for them, said Central Trust Company and James Cheney, said Wabash, St. Louis & Pacific Railway Company, and all persons claiming by, through, or under said last-named company are hereby restrained and enjoined from in anywise obstructing, preventing, interfering with, or refusing to comply with the permit and privilege hereby ordered, adjudged, and decreed.

And said receivers shall by all means in their power aid to fully carry this decree and every part thereof into effect.

And it is further ordered, adjudged, and decreed that the intervenors have and recover of the respondents answering herein their costs and expenses in this proceeding, including the master's compensation, to be herein taxed, and that the receivers, Solon Humphreys and Thomas E. Tutt, are authorized and directed to pay the same out of any funds now in their hands.

(Signed) DAVID J. BREWER,
Circuit Judge.

519 In the Circuit Court of the United States for the Eastern District of Missouri.

CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*, Defendants.	Consolidated Cause. In Equity. Nos. 2357 and 2464.

The City of St. Louis and St. Louis, Kansas City and Colorado Railroad Company, intervenors.

Opinion—Brewer, C. J.—December 13th, 1886.

The intervenors represent that the Wabash road is in the possession of receivers appointed by this court, and that such road is the owner of a right of way passing through Forest park and then easterly to the Union depot, in the city of St. Louis. They further represent that said road holds said right of way subject to use by other railroads upon reasonable terms, and seek, through their petition of intervention, an order from this court directing the receivers to permit The St. Louis, Kansas City and Colorado Railroad Com-
520 pany, one of the petitioners, to run its cars and engines over the tracks of the Wabash upon said right of way. They base this claim not upon any reserved right in the State to a new exercise of the power of eminent domain, but upon two contracts made on the 11th day of August, 1875. We have therefore no inquiry to make as to the power of the State to condemn a partial use of an existing railroad track in behalf of a new railroad company. No condemnation is here sought; no proffer made of any condemnation money. Neither have we any inquiry as to the power of the

State to compel one railroad company to permit the use of its right of way by another. The petitioners rest their claim alone on the contracts, and the question is therefore narrowed to the matter of a contract right. While this may narrow it does not belittle the question, nor can we be insensible that important rights and interests are involved in the correct solution of this question. We have, on the one hand, the city of St. Louis, a large commercial city anxious to do everything that it may to further and extend its commercial interests, and urging that a new railroad company may have access to the center of passenger business in the city, and the new company itself, projecting and building a line westward through the State of Missouri, pressing in like manner for such access, and on the other hand, a large corporation with extensive lines which has purchased and paid for a most valuable right of way, admitting it to the Union depot of the city, eager to protect its property interests and to preserve its right of way free for its own use, anxious also doubtless to prevent that competition in business which a new road ocasions. The parties on both sides are earnest and strenuous, for the interests to be affected by the decision are important. We are fully sensible of this importance and have given the matter the most careful consideration.

The facts upon which the claims of the petitioners are based are these:

521 In 1871 the St. Louis County Railroad Company was organized for the purpose of building a narrow-gauge road from the city of St. Louis to Creve Cœur, a distance of about sixteen miles. Its proposed route crossed diagonally the northeastern part of what is now Forest park. That ground at the time belonged to one W. D. Griswold, and from him, the same year, the railroad obtained a deed to the right of way. In 1872 the General Assembly passed an act entitled "An act to establish Forest park." By section five of the act the control and government of the park was placed in the hands of a board of commissioners. These commissioners in the fall of 1872 made an agreement with the county railroad changing the location of the right of way granted by Griswold and enlarging its width from forty to seventy feet. In the winter of 1872 and 1873 the supreme court of Missouri decided that the act to establish Forest park was unconstitutional and void. Of course, with the downfall of the act went all contracts and arrangements made by the park commissioners. The title of the county railroad to the right of way granted by Griswold remained as it originally existed, unaffected by the attempted agreement with the park commissioners.

In 1874 the General Assembly passed a new act to establish Forest park. This act was adjudged valid. By it also the government and control of the park was vested in a board of commissioners. In section third, which provided for the vesting of the title to the property in the people of the county by general condemnation proceedings, was inserted this proviso: "Provided, That nothing in this act shall prevent the St. Louis County railroad from using and occupying a right of way of the width of not more than seventy

feet through the northeastern portion of said Forest park. The said railroad shall only enter the park through Duncan's subdivision, on the east side of said park, and, running westwardly
522 on the northern side of the River Des Peres, shall pass out of said park at a point on the northern line thereof east of Union avenue: And provided further, That no switch or siding shall be constructed by said railroad company in said park, nor shall more than one depot be established in said park, and that shall be for passengers only: And provided further, That the grade of said railroad, as far as the same runs through Forest park, shall be approved by said Forest park commissioners." The route mentioned in this proviso departs from the route named in the Griswold deed and comes more closely to that named in the agreement of 1872 between the county road and the park commissioners. In addition to this right of way through the park the county road proceeded to acquire title to certain tracts and parcels of ground along its route from the eastern boundary of Forest park to the Union depot These tracts were not contiguous so as to form a continuous right of way, but were separate and with much intervening space between.

The St. Louis, Kansas City and Northern was the owner of a standard-gauge railroad extending from St. Louis to Kansas City, with a branch running northerly from Moberly. It had for years entered St. Louis along the levee, reaching the city on the north side. Desiring to enter the Union depot, it proceeded to lay off a line from Ferguson, which ran parallel or nearly so with the line of the county railroad through the park and thence easterly to the Union depot. Such was the situation when the contracts which are the basis of the present claim were executed.

The first of these contracts was between the St. Louis County railroad, party of the first part, and the St. Louis, Kansas City and Northern railroad, party of the second part, companies which for convenience hereafter may be called respectively the county company and the Kansas Company. By this contract the county company agreed to convey to the Kansas Company an undi-
523 vided one-half interest in the right of way through Forest park and a strip twenty-eight feet in width through the several tracts owned by it between the eastern line of Forest park and the western limit of the city and a strip thirty feet in width through the various tracts owned by it eastward from those limits to the Union depot. In consideration of this the Kansas road was to pay $125,000. This contract further provided that the right of way through the park as well as a tunnel and cut contemplated just east of the park were to be used in common by the two roads. Beyond that eastwardly to the depot the contemplation was of two separate rights of way with independent tracks for each road, with a further provision that at two places, unless the county road could obtain the use of the street, it should be permitted to put a third rail on the right of way of the Kansas road. It was further provided that the Kansas road should construct and maintain the road-bed through the park and the tunnel and cut hereinbefore referred to; also that the county company should within two years pay to the Kansas

Company one half of the cost of this construction, and that on failure thereof it should forfeit all right and interest in said right of way and be forever excluded therefrom.

The second contract, made the same day, was what is known as the tripartite agreement, the parties to it being the commissioners of Forest park, party of the first part, the county company, party of the second part, and the Kansas Company, party of the third part. Each of these contracts refers to the other, and while the tripartite agreement was executed after the other they are so connected as properly to be considered parts and parcels of one contract. This tripartite agreement recited that "said Forest park commissioners, in consideration of the relinquishments, agreements, and stipulations hereinafter contained on the part of said party of the
524 second part, do hereby accept and approve the line and grade of said railroad as laid down and described upon the accompanying plat and profile hereto attached and forming part of this agreement, and said line and grade, in case there is no forfeiture of this agreement, is hereby fixed as the sole and finally established right of way to which said party of the second part is entitled, by statute or otherwise, through said park or any part thereof, and the width of said right of way as established by statute is hereby reduced from seventy (70) feet and fixed at forty-two (42) feet between its outer points;" then that the county road, in consideration thereof, relinquished twenty-eight feet off the seventy feet established by statute for its right of way through Forest park, with the proviso that in case the right of way described and established should not be promptly placed at the disposal of the county road this agreement should be set aside and become null and void. It then, in eight successive paragraphs, provided for the manner of constructing the road bed through the park by the county road, and also for the building of the depot outside the right of way, but immediately adjoining thereto. The ninth paragraph reads as follows: "Said party of the second part shall permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park and up to the terminus of its road in the city of St. Louis upon such terms and for such fair and equitable compensation to be paid to it therefor as may be agreed upon by such companies." The tenth paragraph is an admission by the county road that its right of way is not exclusive, and that this agreement is not to be construed as limiting or impairing the right of the park commissioners to grant another right of way to any other railroad company. The twelfth paragraph is as follows: "And whereas, for the purpose of enabling the party of the third part to reach the Union depot of St. Louis,
525 Missouri, an amicable agreement and arrangement for a right of way outside of and through said Forest park has been made and entered into by and between the parties of the second and third parts, and in pursuance thereof the parties of the second and third parts are to enter upon and enjoy the right of way and all the rights, privileges, immunities, powers, improvements, and property belonging to or vested in or that may belong to or vest in

the party of the second part in common in, upon, and through said park under certain regulations, terms, and conditions agreed upon by and between said parties therein; and whereas the party of the third part, in further pursuance of said last-named agreement, is about to construct, maintain, and operate a railroad in, upon, and through said park at great expense and to engage in other great outlays and to assume other heavy burthens and responsibilities to be of advantage to said third party through the continued enjoyment of said right of way and other rights, privileges, powers, franchises, immunities, improvements, and property in, upon, and through said park: Now, therefore, in view of the premises and as inducements to said party of the third part to proceed as intended, the party of the first part does hereby grant and convey unto and license and permit the said party of the third part, its successors and assigns, to have, hold, use, and enjoy said right of way in, upon, and through said park in common with and to be held and enjoyed jointly with said party of the second part and its assigns on the terms of the said contract between them and under the same terms and conditions as are hereby and hereinbefore imposed upon said party of the second part and which are hereby assumed by said party of the third part as to improvements, except as to building a depot and switch in said park, which the party of the second part is to do itself, or in case said party of the second part, its
526 successors or assigns, should forfeit its said rights, privileges, and franchises in, upon, and through said park, or from any cause cease to have, maintain, and enjoy the same, then it is hereby agreed and covenanted that the party of the third part shall not also be excluded from said park, but shall, with its successors and assigns, continue to have, maintain, and enjoy all of said rights, privileges, immunities, franchises, improvements, and property on the terms hereinbefore set forth continuously and forever." The thirteenth paragraph provides that the Kansas road shall have no depot in the park. The fourteenth paragraph, so far as it is material, is as follows: "Now, therefore, in consideration thereof and of the agreement of the party of the third part herein, the party of the first part herein accepts the agreement and contract of the party of the third part herein to execute, perform, and comply with all of the terms, provisions, and things herein mentioned to be done, performed, or complied with as to said improvements, except as aforesaid by the party of the second part hereto, so far as assumed as aforesaid, releasing it therefrom, and in consideration thereof the party of the third part hereto covenants and agrees with the other parties hereto that it will, in lieu and stead of the party of the second part hereto, do, perform, and comply with all the terms and provisions, matters and things, herein expressed to be done, performed, or complied with by said party of the second part as to said improvements, except as aforesaid, subject to the terms and conditions in said agreement of even date herewith contained; and it is hereby expressly covenanted and agreed that a compliance by the party of the third part, for itself or for itself and the party of the second part jointly, in the construction of said railroad in, upon,

and through said park, tunnel, and cut in accordance with the terms of this agreement shall be taken and accepted as a performance of the conditions imposed upon said party of the second
527 part; and it is expressly covenanted and agreed that all and every part of the work, its kind, description, and extent, to be performed by either of said parties of the second or third parts is hereinabove expressed, and neither of said parties shall be held or required to do or perform any other or further work and conditions than those hereby definitely set forth."

It will be observed that by the ninth paragraph the county road agreed to permit the use of its right of way by other railroads. Whether a like obligation was assumed by the Kansas road depends upon the last sentence in the twelfth paragraph, which purports to grant to the Kansas road the right to occupy and enjoy the right of way through the park jointly with the county road "on the terms of the said contract between them and under the same terms and conditions as are hereby and hereinbefore imposed upon said party of the second part, and which are hereby assumed by said party of the third part as to improvements, except as to building depot and switch in said park, which the party of the second part is to do itself."

It must be conceded that the meaning of this language is not perfectly clear. It is claimed by the defendants that the words "as to improvements, except as to buildings, etc.," qualify not only the immediately preceding clause, commencing "and which are hereby assumed," but also the one prior, commencing "and under the same terms and conditions," and therefore that the terms and conditions as to improvements are those alone cast upon the Kansas road. This would make the two clauses but a single compound one, qualified by the following relative clause "as to improvements," etc. As against this it must be observed that grammatically, a relative clause generally qualifies its immediate antecedent, and therefore in this case would refer simply to that clause which provides for the assumption by the Kansas road. This natural grammatical construction is
528 strengthened by the punctuation, a comma after the words "party of the second part" and none after the words "party of the third part," which seems to separate the entire first clause from the second and its qualifying terms. I know that the matter of punctuation is never relied upon to defeat the obvious intent, but when the meaning is doubtful the punctuation is certainly a matter tending to throw light upon it. Further, there are not simply two, but really three antecedent clauses, the first one being "the terms of the said contract between them"—that is, the two railroad companies. Very clearly this qualifying clause does not refer to that, and therefore it should not be held to qualify the second, unless the obvious intent compels such construction. It is objected that the clause commencing "and which are hereby assumed" is under this construction superfluous. I think not. These improvements called for the expenditure of money and the idea seemed to be that the Kansas road should not only hold its rights upon certain conditions, but that as to those involving expenditure of money it should ex-

pressly assume the performance. There is a manifest difference between a conveyance subject to a mortgage and a conveyance in which the grantee assumes the payment of the mortgage. This distinction evidently dictated the form of expression used. Again, it is insisted that by the fourteenth paragraph the parties expressly declared what they meant by the terms and conditions imposed upon the county road, for in next to the last sentence quoted it is provided that "a compliance by the party of the third part for itself or for itself and the party of the second part jointly in the construction of said railroad in, upon, and through said park, tunnel, and cut in accordance with the terms of this agreement shall be taken and accepted as performance of the conditions imposed upon said party of the second part;" but this language, which while taken by itself seems very broad, must be construed in reference to the context.
529 From the opening language of the paragraph it appears that the parties were stipulating concerning the matter of improvements alone and in reference to the party by whom said improvements should be made, and when in this sentence certain work done by the Kansas road is declared to be taken and accepted as a performance of the conditions imposed upon the county road it must be taken as referring simply to the conditions in respect to improvements. This construction is strengthened by the language following this sentence, in which it is said that neither of said parties, neither the county road nor the Kansas road, "shall be held or required to do or perform any other or further work and conditions than those hereby definitely set forth." Certainly it was not meant by this to nullify the provisions of the ninth paragraph or release the county road from the stipulation therein contained. Making the fourteenth paragraph refer simply to the matter of improvements, as indicated by its opening sentence, it becomes consistent and harmonious with the balance of the agreement. Further, it is insisted that if it was the intent of the parties that such an important obligation should be assumed by the Kansas road the language imposing it would have been more definite, precise, and clear, and that the very uncertainty of this language precludes the idea that it was the intent of the parties that this obligation should be cast upon the Kansas road. Counsel speak of it as "a ghastly blunder," and argue that from language of such doubtful import no imputation of such a blunder ought to be cast upon the then representatives of the Kansas road. Probably at that time, more than ten years ago, the assumption of such an obligation did not seem to be a matter of serious moment. Indeed, the very language in which the ninth paragraph is couched and by which unquestionably such an obligation was intended to be cast upon the county road lacks, as
530 we shall hereafter see, the precision, certainty, and fullness which in view of the present importance of such a stipulation would to-day be expected. Again, it is insisted that there was no consideration for this stipulation on the part of the Kansas road. It is urged that the county road had by virtue of its deed from Griswold and the act establishing Forest park a clear, legal title to a right of way seventy feet in width through the park, a title beyond

the possibility of interference by the park commissioners; that the only power left with the park commissioners was in respect to the grade; that the county road had under the statutes a right to convey any or all of such right of way to the Kansas road; and that having such right of way an attempt by the park commissioners to impose this condition was unauthorized; that the assumption by the Kansas road was without consideration and not binding. To this it may be replied that the park commissioners accepted and approved the proposed grade; that by the last clause of the tripartite agreement they agreed to build and maintain certain arched entrances and exits from the park, and that, as a matter of fact, they did thereafter spend many thousand dollars in such work, and finally that the agreement indicates on its face that it was made as a compromise of certain claims on the part of the respective parties. The law favors compromises; upholds them as considerations of the covenants of the compromising parties. The park commissioners claimed the right to grant a right of way through the park. By the terms of this tripartite agreement they conveyed this right and approved the proposed grade and contracted to do work along that line. Clearly there was consideration for this stipulation. While I concede that the language is not entirely perspicuous, yet I think the true construction is that the Kansas road assumed the stipulation of the ninth paragraph; that there was sufficient consideration, and therefore a binding stipulation upon it.

531 For further argument tending to show that this is the true construction and that there was sufficient consideration, I refer to the elaborate opinion of the special master, filed in this cause. A solution of this question only opens the door to others, some of which are even more embarrassing and difficult of solution. It is insisted that by this stipulation the railroad company agreed to permit the use of its right of way and did not agree to permit the use of its track or road-bed, and that the road should not be bound, therefore, beyond the very letter of its obligation.

Also that this agreement was not one running with the land; that it bound only the party assuming it as a merely personal covenant; and while, therefore, binding on the Kansas road and also the Wabash Company, into which it was consolidated, it does not bind the mortgagees who take as purchasers and as purchasers without notice.

Further, that the use by other railroad companies stipulated for was to be only on such compensation as should be agreed upon by the parties, and that in the absence of such agreement by the parties the court had no power to determine the amount of compensation or enforce the contract.

And again, that the contract is one which in its nature is not susceptible of specific enforcement, because the duties required by it and which are sought to be enforced are of a continuous character, require the personal skill and cultivated judgment of the officers of the defendant road, and therefore the matter cannot be disposed of by one decree, but will require the permanent retention of the case and constant supervision by the court.

Still again it is insisted that there is no mutuality in the contract, and that therefore it is one that courts will not specifically enforce, and, finally, that if all these objections fail the amount of compensation reported by the master is not fair and adequate, but should be largely in excess of that amount.

532 Of these in their order. The language of the ninth paragraph, under which, as before noticed, intervenors must claim, is that the party of the second part shall permit other railroads to use its "right of way." Now, the term "right of way" has a twofold signification. It sometimes is used to describe a right belonging to a party, a right of passage over any tract, and it is also used to describe that strip of land which railroad companies take upon which to construct their road-bed. Obviously in this paragraph it is used in the latter sense. Through both of these contracts the terms "right of way," "track," and "road-bed" frequently appear, and in all cases the term right of way is used as descriptive of the strip above referred to. Notably in the fifth paragraph is the distinction between the "right of way" and the "track" disclosed, in which it is provided that the depot shall be wholly outside of the right of way, but immediately adjoining the track. Now, the right of way through the park as given by the Griswold deed was forty feet, as fixed by the contract with the Forest park commissioners was seventy feet, and by this present contract forty-two feet. So the county road conveyed to the Kansas road outside of the park a strip either thirty or twenty-eight feet in width for its right of way. My thought at first was that the intervenors could only claim a right to use so much of this right of way as was not in fact occupied by the track of the Wabash, and that all that was intended by this ninth paragraph was to permit other railroad companies to occupy and use so much of the Kansas road's right of way as it did not itself occupy and use; but after reflection on the arguments of counsel I have been led to the conviction that this was too narrow a construction and was not the real intent of the parties. The master in his report shows that the entire right of way is occupied by tracks and sidings, so that there is no room for another and independ-

533 ent track, and as there is nothing to show that this occupation has not been made in good faith and to supply the needs of the Wabash Company, if my first interpretation had been correct, the intervenors would plainly be without any rights. I think, however, the true construction is this: That the Kansas Company was to have the first right, a right not limited to its necessities, but as broad as its convenience. Subject and only subject to such prior right other companies were to have the use of the right of way, and if the respondent's business compelled the occupation by its tracks or sidings of the entire right of way, but the convenience of its business would permit the use of those tracks and sidings by another road, then such other road would be entitled to the use of both the right of way and the tracks and sidings. This construction is, I think, in accordance with the obvious intent of the parties who were contracting for general rights and not fixing the specific details.

With reference to the next matter it is not seriously contended that the obligations assumed by the Kansas road are not also binding on the Wabash, because the latter is a mere consolidation of the former with other companies, but the contention is that the mortgagees take as purchasers free from any burdens which do not run with the land or of which they do not have either actual or constructive notice. On the same day on which these contracts were executed the county road executed a deed to the Kansas road of the undivided half of the right of way through the park and of the separate portions of the various parcels of ground eastward to the Union depot, which deed was recorded two days thereafter. This deed recites that it is executed "in pursuance of the terms of a certain contract made and executed by and between the parties of the first and second parts hereto and dated August 11th, A. D. 1875,
and in full satisfaction of so much of said contract as re-
534 lates to the conveyance of certain pieces of land and right
of way to said party of the second part by said party of the first part." Also towards the close of the instrument, after providing for a transfer of an undivided half of all right of way and all other rights and privileges, franchises, powers, and immunities owned by or vested in the party of the first part, in, through, or upon Forest park, it has these words: "All of which conveyances of the said right of way in this deed mentioned are made subject to the terms and conditions upon which the same were granted to the party of the first part." Now, the tripartite contract was recorded prior to the consolidation of the Kansas road with the Wabash and prior to the issue of the mortgages referred to. There being express reference in the deed from the county road to the Kansas road to the contract in pursuance of which the deed is made, and an express declaration that the conveyances are made subject to the terms and conditions upon which the grantor received them, it seems to me that there is enough to cast upon even a *bona fide* purchaser notice of the terms and conditions of these contracts. It is argued with great force, however, by counsel for the respondents that even if the purchasers were charged with notice of these terms and conditions as attaching to the lands described in the deed, inasmuch as the Kansas road obtained a large portion of its right of way between Forest park and the Union depot from other sources, it took these latter portions free from any burden cast upon the lands specifically conveyed by the county road. "Can it be," he says, "that a condition in a deed of a few feet of the right of way in a long line of three hundred miles casts a burden on the entire line to be assumed by every succeeding purchaser?" I might answer this extreme case by a reverse question: Can it be possible that a condition attached to substantially the entire right of way of this long line
535 of road can be defeated by the fact that some few feet have
been acquired by a deed free from such condition? But these extreme cases do not constitute the practical matter before us. Here the county road had an incomplete right of way through the park and to the Union depot. A share of this incomplete right of way it conveyed to the Kansas road subject to certain conditions. Can

it be that the completion by the Kansas road of this right of way by purchase of intervening and isolated tracts destroys the entire value of the conditions? Looking at this matter in a practical way and from a reasonable standpoint, I think the answer to this question must be in the negative.

Passing to the next matter, the ninth paragraph contemplates that the conditions and compensation for use should be determined by personal agreement. As there has been no such personal agreement, counsel deny the power of the court to interfere and say that any interference would be the making of a new contract. They refer to the familiar cases in which parties in their contract have stipulated for a particular mode of determining rent or other compensation, as by arbitration, etc. In such cases courts have held that parties cannot ignore such stipulations and invoke the aid of the courts in the first instance to determine; but here the respondents deny the right. They never advanced to the position of a mere disagreement about the amount of compensation or terms of use. As the question of right must be settled before the question of compensation is presented, and as the respondents by denying the right have forced the intervenors to an application to the court, it seems to me that the court, taking cognizance of the question of right, is bound to determine the whole case and settle both the right and the compensation. It is a general doctrine that a court once taking jurisdiction of a controversy is bound to continue that jurisdiction up to the final determination of the entire controversy. The stipulation provided for use under such reasonable terms and
536 regulations and for such reasonable compensation as should be agreed upon. It cannot be that the mere whim and caprice of the one party, a blind refusal to come to any agreement, can nullify the entire force of the stipulation. It would make the right of the intervenors a mere barren right. It would nullify the entire stipulation and operate simply to give to the respondents that which without it they had—the privilege of permitting other roads to enter. It would be mockery to call such a provision a stipulation for a right.

The next matter is one of exceeding difficulty. The stipulation is general in its nature; contains no provision as to details. Is it thereby rendered so incomplete that the courts may not enforce it? That a court may enforce by its decree either a contract or legislative right to the use by one railroad company of the tracks of another cannot, it seems to me, under the intimations of the Supreme Court in its recent decision in the Express cases, be doubted. In England legislation has been had in reference to this matter, and the right thus granted has been enforced by the decrees of courts; and so if this contract had provided the details so that all that the court would have to do would be to declare by its decree that the plaintiff was entitled to the benefit of such contract the duty of the court would seem plain. Does the omission of the details destroy the power of the court and practically nullify the force of the stipulation, or was it the intent of the parties simply to contract for a right and leave with the court in the absence of the agreement

of parties the full determination of all the details? I am aware of the rule that courts are not bound to relieve parties from mistakes or omissions or to complete contracts which parties have left incomplete; but it is also true that ofttimes at the making of the contract for a right it may be impossible to determine details or the changing situation of affairs may indicate that details also
537 must be subject to modification, and therefore should not be definitely prescribed and should be left to settlement by agreement or decree at the time the right is insisted upon. In such cases, if the right is absolutely contracted for and the details are of a nature which courts may properly fix and settle, then, I take it, the courts should not hold the contract incomplete, but determine the right, and also prescribe and settle the details. An act of the Legislature might be passed giving to one company the right to use the tracks of another and prescribing all the terms and conditions, the details, for the use. I take it an act of the Legislature would also be valid which simply declared that one company should have the right to use the tracks of another upon such terms and conditions as the parties might agree upon or should be prescribed by the court; and if such a legislative act would have to be adjudged valid and complete I see no satisfactory reason why courts may not also hold sufficient and valid a mere contract for the right, and determining the right, also settle and prescribe the terms of the use. It is true that such a decree cannot be executed by the performance of a single act; it is continuous in its operation; it requires the constant exercise of judgment and skill by the officers of the corporation defendant, and therefore, in a qualified sense, it may be true that the case never is ended, but remains a permanent case in the court, performance of whose decree may be the subject of repeated inquiry by proceedings in the nature of contempt. It is also true that in the changing conditions of business the details of the use may require change. The time may come when the respondent's business may demand the entire use of its tracks and the intervenor's right wholly cease; but other decrees are subject to modification and change, as in decrees for alimony. The courts are not infrequently called to modify them by reason of the changed condition of
538 the parties thereto; so when a decree passes in a case of this kind it remains as a permanent determination of the respective rights of the parties, subject only to the further right of either party to apply for a modification upon any changed condition of affairs; and, so far as any matter of supervision of the personal skill and judgment of the officers of the respondent corporation, the contract in terms provides that the regulation of the running of trains shall be subject to the control of the officers of the respondent. While I concede that there is force in the objection that this must remain, in a qualified sense, a continuing case in the courts, with the constant duty of supervising the acts of the respondent, yet it seems to me that where there is a right there must be a remedy, and that the mere machinery of court procedure is flexible enough to adapt itself to the necessities of protecting a right. Clearly a mere action for damages would be a grossly inadequate

remedy. Clearly the public interests justify, if they do not compel, the enforcement of this right, and so, with much hesitation, I have come to the conclusion that this objection cannot be sustained.

So far as the objection on the ground of the want of mutuality in the contract, I think it of little force. The respondent has been paid for the privilege that is now claimed. The consideration, as I have heretofore shown, was ample, and when a party has received payment for a privilege I do not think it can resist the enforcement of that privilege on the mere ground that it cannot compel the other party to continue in its enjoyment.

The final matter is that of compensation. In this I think the master erred. He fixed the value of the right of way at a million of dollars, and reported that, in his judgment, the share of the interest on this value and in the expenses of keeping up the track which the intervenor company should pay should be fixed upon a wheelage basis. So far as respects the mere matter of keeping up the track, I see no reason to doubt the justice of the rule fixed
539 by the master; but in regard to the interest on the value I think the intervenor should pay one-half of that, and for these reasons: It is a familiar fact that in a large city like St. Louis, along the track of an important railroad, within the city limits are built large manufacturing establishments, warehouses, and other buildings for the convenient transaction of business between the carrier on the one hand, the manufacturer and the merchant on the other. Another road coming over the same track not only uses the property—of great value—which the company owner has in the first instance paid for, but also shares in the benefit of access to all these manufactories, warehouses, &c. It thus places itself in competition with the original company for this valuable business. Such competition may operate to diminish the business of the original company or compel it to lower its rates to preserve the business. In either way it operates to the serious detriment of the original company. The new company comes in as an equal competitor. It shares in all the benefits of this business, and it may share equally. Under those circumstances it seems to me no more than fair that a new company which crowds itself into an equal access to such benefits and such privileges should pay an equal share of the interest on the value of the property. Hence I shall sustain the objections of the respondent in the report of the master so far as concerns the amount of compensation, and I think that the intervenor company must pay one-half the interest on the value and its share of the cost of keeping up the track, determined upon a wheelage basis. In other respects the report of the master will be confirmed.

In conclusion let me say that I have given the various questions here presented a most careful examination. I am fully sensible of the many difficulties that have attended the solution of these questions, and my conclusion has been reached after much hesi-
540 tation. I have endeavored to preserve fully the property rights of the respondent company. At the same time I have been deeply impressed with the truth that railroads are performing a quasi-public service, and that so far as vested property interests

are not impaired such construction should be given to all contracts and legislation as will make these public servants most fully subserve the interests and welfare of the general public.

(Signed) DAVID J. BREWER,
Circuit Judge.

TREAT, *D. J.:*

I concur fully with so much of the foregoing opinion as establishes the intervenor's right to the entrance into St. Louis over respondent's right of way and tracks, subject to reasonable regulations by respondent, for the safe conduct of persons and property in the common use thereof.

This case involves a very difficult and complicated inquiry, and the court has been embarrassed by the many obscure details of the different contracts. After reading and analyzing with the most painstaking care the special and general provisions of the contracts in question no other conclusion could be reached than that stated by my brother judge, viz., that the intervenor has a right to the use of the track and right of way of the respondent. The very terms of the original contracts to which the respondent succeeds cast upon it the obligations connected therewith. In other terms it takes *cum onere.*

Hence I concur fully with my brother judge that the right of user exists, but I differ as to the propriety or duty of fixing the measure of compensation in this stage of the case. Those terms are by the contract to be agreed upon by the parties, and why should they not have an opportunity to come to an agreement? True, the re-
541 spondent denies the right of intervenor to the use of its track and right of way, and consequently in the intermediate inquiry refused to enter upon terms. How could it make such terms without confessing intervenor's right?

It having now been decided, with full concurrence on my part, that the intervenor has the right claimed, the difficult proposition is thrust upon the court as to the terms of its enjoyment. By the contract itself those terms are to be settled by the parties. Why should they not be permitted to do so? If hereafter it should occur that through fraud, attempted extortion, or otherwise, the right of user is to be practically defeated the court would necessarily lay its hand upon the transaction and enforce the respective rights of the parties as justice might demand.

It seems to me that the measure of compensation should not be prescribed at the present state of the controversy irrespective of the terms of the contract as to the mode of determining the same, the more especially as the intervenor has no exclusive right in the premises. Another railroad corporation may appear next year and insist upon its rights under the contract, and so on from time to time successive corporations. The respondent must make necessarily the proper regulations for safety and otherwise pertaining to the use of a common track entering a large city like St. Louis, where the most complicated details are needed for approaches to a common depot.

It is true that the "express cases" rested on an independent proposition, and consequently cannot govern this case. Here is a distinct contract by which the respondent is bound. It took *cum onere*. By the terms of the obligation others could use, subject to its regulations, the common track and right of way upon such consideration as the parties might agree upon. They have not as yet agreed, and since this determination of the right of intervenor no
542 opportunity has been given them to consult and agree. It may be that they can do so more wisely and justly than the court if opportunity is given. It is obvious that courts are not, without fullest evidence before them, equal to the task of prescribing how railroads should be operated in their minute details, one with the other, in the interchange of traffic or use of common tracks, depots, etc. When difficulties arise, as now, where rights between them are to be determined, the adjustment of details should be left where the contract leaves it; otherwise, not only great injury and confusion may occur, but the court be compelled to retain an indefinite control of the case to meet ever-shifting contingencies—as to transportation, new improvements, advancing trade, &c., &c.

In my view of this case the question of compensation between the parties should not be decided now, but reserved for further consideration.

There are some minor elements as to the status of the parties technically which may be worthy of further consideration should cause therefor be presented. By this is meant the position occupied by the purchasing committee under the terms of sale heretofore made.

The result is that I fully concur in the foregoing opinion, except so far as the same determines the measure of compensation between the parties, not that the rule may or may not be correct, if the court is compelled finally to pass upon the same, but merely that such action is premature and should be reserved for further action, if needed.

543 And afterwards, to wit, on the 13th day of January, A. D. 1887, at said September term of court, 1886, the following further proceedings were had and appear of record in said cause, to wit:

CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* WABASH, ST. LOUIS AND PACIFIC RAILWAY Co. *et al.*, Respondents.	Nos. 2357 & 2464. Consolidated Cause.

In re intervening petition of the City of St. Louis and the St. Louis, Kansas City and Colorado Railroad Company.

Now come the purchasing committee, the Central Trust Company of New York and James Cheney, trustees, and the
544 Wabash, St. Louis and Pacific Railway Company, by their solicitors, on whose motion it is ordered that an appeal from

the decree of this court to the Supreme Court of the United States be allowed on their giving an appeal bond in the penal sum of one thousand dollars, to be approved by the court or one of the judges thereof.

And afterwards, to wit, on the 22nd day of January, A. D. 1887, the following further proceedings appear of record in said cause, to wit:

CENTRAL TRUST COMPANY OF NEW YORK *et al.*
vs.
WABASH, ST. LOUIS AND PACIFIC RAILWAY CO. *et al.*
Nos. 2357 & 2464. Consolidated Cause.

In re intervening petition of the City of St. Louis and the St. Louis, Kansas City and Colorado R. R. Co.

Now come the purchasing committee, the Central Trust
545 Company of New York and James Cheney, trustees, and the Wabash, St. Louis and Pacific Railway Company, by their solicitors, and present their appeal bond in the sum of one thousand dollars, which is approved by the court and ordered to be filed as part of the record herein.

And thereupon it is ordered that the clerk of this court make out and certify to the Supreme Court of the United States a transcript of the record and proceedings in this cause.

Said appeal bond is in words and figures following, to wit:

Know all men by these presents that we, the Wabash, St. Louis & Pacific Railway Company, Central Trust Com-
546 pany of New York and James Cheney, as trustees, and James F. Joy, Thomas H. Hubbard, Edgar T. Welles, and O. D. Ashley, as purchasing committee, made parties by an order of court December 31, 1886, as principals, and R. C. Kerens and Thos. E. Tutt, as sureties, are held and firmly bound unto the city of St. Louis and the St. Louis, Kansas City & Colorado Railroad Company in the full and just sum of one thousand dollars, to be paid to the said city of St. Louis and St. Louis, Kansas City and Colorado Railroad Company and their successors and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly by these presents.

Sealed with our seals and dated this 13th day of January, in the year of our Lord one thousand eight hundred and
547 eighty-seven.

Whereas lately, at the September term, 1886, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between said City of St. Louis and St. Louis, Kansas City & Colorado Railroad Company, as intervening petitioners in consolidated cause Nos. 2357 & 2464, in equity, wherein The Central Trust Company of New York and James Cheney, as trustees, are plaintiffs and The Wabash, St. Louis & Pacific Railway Company *et al.* are defendants, there was rendered against the said

principal obligors herein a final decree in favor of the said
548 obligees herein, and the said principal obligors herein having obtained an appeal of the said court to reverse the said final decree in the aforesaid suit, which said appeal was prayed in open court on the 13th day of January, 1887, to the Supreme Court of the United States at a term thereof to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the principal obligors herein shall prosecute said appeal to effect and answer all damages and costs if they fail to make good their plea, then the above obligation is to be void; else to remain in full force and virtue.

549 & 550 Sealed and delivered in presence of—

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY,
By O. D. ASHLEY, *Secretary.*
Attest: W. W. BEACH,
[SEAL.] *Ass't Secretary.*
CENTRAL TRUST COMPANY OF NEW YORK,
By F. P. WOLCOTT, *President.*
Attest: C. H. P. BABCOCK,
[SEAL.] *Secretary.*
O. D. ASHLEY. [SEAL.]
EDGAR T. WELLES. [SEAL.]
THOMAS H. HUBBARD. [SEAL.]
R. C. KERENS. [SEAL.]
THOS. E. TUTT. [SEAL.]

Approved:
SAMUEL TREAT,
U. S. Dist. Judge.

Filed January 22, 1887.

A. P. SELBY, *Clerk.*

551 UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record and proceedings *In re* the City of St. Louis and the St. Louis, Kansas City & Colorado Railroad Company, intervenors in case Nos. 2357 & 2464, consolidated, of The Central Trust Company of New York and others, complainants, against The Wabash, St. Louis & Pacific Railway Company and others, defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said district,

this 13th day of September, in the year of our Lord eighteen hundred and eighty-seven.

{ Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri. }

A. P. SELBY,
Clerk of said Court.

552 UNITED STATES OF AMERICA, } ss:
Eastern Division of the Eastern Judicial District of Missouri, }

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, do hereby certify the writing hereto attached to be a true copy of the original exhibit marked "chart A," referred to on pages 154 and 206 of the Transcript of Record on appeal, *In re* the City of St. Louis and the St. Louis, Kansas City and Colorado Railroad Company, intervenors, in case Nos. 2357 & 2464, consolidated, of The Central Trust Company of New York and others, complainants, against The Wabash, St. Louis and Pacific Railway Company and others, defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in the eastern division of said district, this 13th day of September, in the year of our Lord eighteen hundred and eighty-seven.

{ Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri. }

A. P. SELBY,
Clerk of said Court,
By —— ——, *Deputy.*

(Here follows plat marked p. 553.)

[Endorsed:] Nos. 2357 & 2464 (consolidated). United States circuit court, eastern division of the eastern judicial district of Missouri. Central Trust Co. of New York *et al.* against Wabash, St. Louis & Pacific R'y Co. *et al.* Duly certified copy of original exhibit "chart A" *In re* City of St. Louis and St. Louis, Kansas City & Colorado R. R. Co., intervenors in the above-entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 402. James F. Joy, Thomas H. Hubbard, Edgar T. Welles, & O. D. Ashley, as purchasing committee; The Central Trust Co. of New York, and James Cheney, trustees, and The Wabash, St. Louis & Pacific Railway Co., appellants, *vs.* The City of St. Louis and The St. Louis, Kansas City & Colorado Railroad Company. Filed September 17, 1887.

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 106.

JAMES F. JOY, THOMAS H. HUBBARD, EDGAR T. WELLES, AND O. D. ASHLEY, AS PURCHASING COMMITTEE; THE CENTRAL TRUST COMPANY OF NEW YORK AND JAMES CHENEY, TRUSTEES, AND THE WABASH ST. LOUIS AND PACIFIC RAILWAY COMPANY, APPELLANTS,

vs.

THE CITY OF ST. LOUIS AND THE ST. LOUIS, KANSAS CITY AND COLORADO RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT AND BRIEF FOR APPELLANTS.

WELLS H. BLODGETT,
Solicitor for Appellants.

LEVISON & BLYTHE STATIONERY CO., ST. LOUIS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1890.

JAMES F. JOY, ET AL.,
Appellants,

vs.

THE CITY OF ST. LOUIS AND ST. LOUIS, KANSAS CITY & COLORADO RAILROAD COMPANY,
Respondents.

No. 106.

STATEMENT.

The objects of the suit

This action was brought by respondent to compel the specific performance of a contract, through which respondent (the Colorado Railroad Company) claimed itself entitled to a joint use, with appellants, of that portion of appellants' tracks which extend eastwardly from a point on the northern line of Forest Park, through the park, and from thence

to the Union Depot in the City of St. Louis at Eighteenth street. The facts out of which the controversy arose are, substantially, as follows:

The County Railroad Company organized

First. In August, 1871, a railway corporation known as the "St. Louis County Railroad Company" was organized under the General Laws of Missouri, to construct a narrow gauge railroad, from the City of St. Louis in a westerly direction to a point in the County of St. Louis 16 miles from the city. (Printed Record, p. 286.)

A right of way granted by Griswold.

Second. In November, 1871, W. D. Griswold was the owner of a tract of land lying immediately west of the City of St. Louis, known as the "Cabanne Dairy Farm," and on that date Griswold sold and conveyed to the St. Louis County Railroad Company a right of way forty feet in width, through the tract owned by him. (Printed Record, p. 268.)

The Act establishing park.

Third. In 1874 the Legislature of Missouri passed an act for the establishment of *Forest Park*, in the County of St. Louis, immediately west of the city. The act described the property which might be taken by condemnation for park purposes, and included the farm or tract owned by Griswold. The third section of the act contained the following proviso:

"*Provided*, That nothing in this act contained shall prevent the St. Louis County Railroad Company from using and occupying a right of way, of the width of not more than seventy feet through the

northeastern portion of said park; the said railroad shall only enter the park through Duncan subdivision on the east side of said park; and running westwardly on the northern side of the River Des Peres, shall pass out of said park at a point on the northern line thereof east of Union avenue; *and provided* further, that no switch or siding shall be constructed by said Railroad Company in said park, nor shall more than one depot be established in said park and that shall be for passengers only: *and provided* further, that the grade of said railroad, as far as the same runs through said Forest Park, shall be approved by said Park Commissioners." (Laws of Missouri, 1874, p. 371.)

Contract between County Co. and Kansas City Co.

Fourth. On August 11th, 1875, the St. Louis County Railroad Company (hereafter called "the County Company"), having located its line between the city and the park, and having acquired some detached portions of a right of way through a number of lots and blocks between the Union Depot and the park, and the St. Louis, Kanas City & Northern Railway Company (hereafter called "the Kansas City Company") already having a line of railroad from St. Louis to Kansas City, which connected on the northern line of the park with the right of way and line of the St. Louis County Company, the two companies on the 11th day of August, 1875, entered into a contract in which the County Company agreed to convey to the Kansas City Company, for the sum of one hundred and twenty-five thousand dollars, a strip twenty-eight feet wide through each tract owned by it, between the eastern line of the park and the western limits of the city, and a strip thirty feet in width

through each tract, lying between the western limits of the city and the Union Depot at Eighteenth street, and also an undivided one-half of all the right of way it then owned or might thereafter acquire through the park. The contract also provided, among other things, that inasmuch as the Kansas City Company was to make a tunnel and cut just east of the park, it should let the trains of the County Company pass through said tunnel and cut under such regulations and restrictions as were agreed upon, with respect to trains in the park and elsewhere. It was then provided, that the use of the property in the park and through the tunnel and cut should be in common, but that the Kansas City Company should have absolute control of the running and starting of its own trains and the making of its own time-tables, and that no train of the County Company, or its assigns, should be started within eight minutes of the time fixed for starting the trains of the Kansas City Company; that there should be twenty minutes' time between the starting and coming in of the trains of the County Company; that only the County Company should have a depot in the park and that the Kansas City Company should not have a depot or stop its trains in the park.

Contract between County Co. and Kansas City Co., continued.

The contract also provided that at two specified places within the city limits where the right of way of the County Company was narrowest, it (the County Company) might lay and use one rail on the right of way of the Kansas City Company; that where proceedings for condemnation, or nego-

tiations had been commenced by the County Company the same should be prosecuted, or discontinued, as requested by the President of the Kansas City Company. It also provided, that in consideration of the covenants therein contained, and of certain covenants and agreements on the part of the Commissioners of Forest Park contained in another agreement of even date therewith, the Kansas City Company should construct and maintain its railroad through the park, tunnel and cut, for the joint use of both said railroad companies; and said contract also provided that the County Railroad Company would within two years pay to the Kansas City Railway Company one-half the actual cost of constructing said road through said park, tunnel and cut, or forever relinquish to the Kansas City Company all claims to the road and property in said park, tunnel and cut. The contract was signed by said parties and delivered, but it was never acknowledged or recorded in the office of the County Recorder. (See printed Record, p. 233.)

Deed of County Co. to Kansas City Co.

Fifth. On the same day that the foregoing contract was made the County Company, in pursuance of its agreement as in said deed recited, conveyed to the Kansas City Company a strip twenty-eight feet in width through each lot or tract owned by it between the eastern line of the park and the western limits of the city; a strip thirty feet wide through each lot or tract owned by it, between the western limits of the city and Tayon

avenue in the City of St. Louis, and an undivided one-half of all its right, title and interest in or to the right of way and other privileges and franchises then owned or held by it, or which might thereafter be owned or held by it through said park.

The portions of the foregoing deed which are material to this controversy, are as follows:

"And also the said party of the first part (the County Railroad Company) hath conveyed, assigned and transferred, and by these presents doth convey, assign and transfer unto the said party of the second part (the Kansas City Company), * * * * the right of way over and upon the following described piece of land, situated between King's Highway and Union avenue, a strip of land twenty-eight feet in width off the southern portion and for the whole length thereof of that part of the right of way granted to said party of the first part by W. D. Griswold by deed dated Sept. 3, 1871, and recorded in the office of the Recorder of St. Louis County, aforesaid, in Book 443, page 96, lying between the northern line of Forest Park and the eastern line of Union avenue, all of which right of way conveyed by said deed is described as follows, to-wit: 'A strip of land forty (40) feet in width, the centre line of which begins at King's Highway, twenty (20) feet north of the southeast corner of the land of said Griswold, known as Cabanne Dairy Farm, and running thence westwardly along parallel to the other line thereof eight hundred and twenty-five (825) feet; thence by a curve eleven hundred and seventy (1170) feet long, bearing northwest with a radius of nineteen hundred and three (1903) feet, thence by a line bearing north fifty-five degrees, west about ten hundred and ninety (1090) feet to a point on Union avenue, not less than four hundred and eighty-seven (487) feet south of the northeast corner of Robert Forsythe's land. * * * * And also the said party of the first part hath conveyed,

assigned and transferred, and by these presents doth convey, assign and transfer unto said party of the second part and its successors and assigns an undivided one-half of all the right, title and interest of the party of the first part of, in or to the right of way, and of, in or to any and all other rights, privileges and franchises, powers and immunities, owned by or vested in, or enjoyed by the party of the first part, in, through or upon Forest Park by any means or from any source whatever; all of which conveyances of the said rights of way in this deed mentioned are made subject to the terms and conditions upon which the same are granted to the party of the first part."

The foregoing deed contained the ordinary covenants of warranty and was duly acknowledged and recorded in the office of the Recorder of said County, Aug. 13, 1875.

The several pieces of right of way owned by the County Company and conveyed by it to the Kansas City Company are indicated in blue on Chart "A," page 302 of Printed Record.

Tripartite agreement.

Sixth. On the same day (August 11, 1875) another agreement was entered into known as the "Tripartite Agreement," the parties to it being the Commissioners of Forest Park, party of the first part, the County Company, party of the second part, and the Kansas City Company, party of the third part. This tripartite agreement began by reciting:

"That said Forest Park Commissioners, in consideration of the relinquishments, agreements and stipulations hereinafter contained, on the part of said party of the second part, do hereby accept and approve the line and grade of said railroad as

laid down and described upon the accompanying plat and profile hereto attached and forming part of this agreement, and said line and grade in case there is no forfeiture of this agreement, is hereby fixed as the sole and finally established right of way to which said party of the second part is entitled by statute or otherwise through said park, or any part thereof, and the width of said right of way, as established by statute, is hereby reduced from seventy feet and fixed at fourty-two feet between its outer points."

The County Company then relinquished twenty-eight feet off the seventy feet of its right of way established by statute through the park, leaving its right of way through the park forty-two feet in width. The agreement then in eight successive paragraphs, provided for the manner of constructing the roadbed through the park by the County road; provided that it should not be so constructed as to mar the landscape beauty of the park; and for the building of a depot in the park just outside of the right of way but immediately adjoining it.

The eighth and ninth paragraphs read as follows:

Tripartite agreement, continued

Eighth. "The work of constructing said railroad through said park shall be commenced in good faith by the party, as hereinafter specified, within ninety (90) days from the delivery hereof and shall be completed in one year thereafter under penalty of a forfeiture of this agreement, and upon completion thereof the railroads shall be operated through said park so as to prevent unnecessary noise or inconvenience to the public as far as reasonably practicable, and the roads or their assigns shall comply with all reasonable rules or regulations of said Park Commissioners in that respect, and all of the aforesaid permanent improvements shall be

kept and maintained in such condition as will not injuriously affect or mar the landscape beauty of the park, this provision referring to the aforesaid forty-two (42) feet right of way road bed; and said party of the second part, or its assigns, shall also keep its police or guard, within the limits of the Park, neatly uniformed."

Ninth. "Said party of the second part shall permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park and up to the terminus of its road in the City of St. Louis, upon such terms and for such fair and equitable compensation to be paid to it therefor as may be agreed upon by such companies."

The tenth paragraph is an admission by the County Road that its right of way is not exclusive, and that the agreement was not to be construed as limiting or impairing the right of the Park Commissioners to grant other rights of way to other railroad companies. The twelfth paragraph is as follows:

"And whereas, for the purpose of enabling the party of the third part to reach the Union Depot of St. Louis, Missouri, an amicable arrangement and agreement for a right of way outside of and through said Forest Park has been made and entered into by and between the parties of the second and third parts, and in pursuance thereof the parties of the second and third parts are to enter upon and enjoy the right of way and all the rights, privileges, immunities, powers, improvements, and property belonging to or vested in, or that may belong to or vest in the party of the second part, in common, in, upon and through said park, under certain regulations, terms and conditions agreed upon by and between said parties therein; and whereas the party

of the third part, in further pursuance of said last-named agreement, is about to construct, maintain and operate a railroad in, upon, and through said park, at great expense, and to engage in other great outlays and to assume other heavy burthens and responsibilities to be of advantage to said third party through the continued enjoyment of said right of way and other rights, privileges, powers, franchises, immunities, improvements, and property in, upon, and through said park: Now, therefore, in view of the premises and as inducements to said party of the third part to proceed as intended, the party of the first part does hereby grant and convey unto, and license and permit the said party of the third part, its successors and assigns, to have, hold, use and enjoy said right of way in, upon, and through said park, in common with and to be held and enjoyed jointly with said party of the second part and its assigns, on the terms of the said contract between them, and under the same terms and conditions as are hereby and hereinbefore imposed upon said party of the second part, and which are hereby assumed by said party of the third part, as to improvements, except as to building a depot and switch in said park, which the party of the second part is to do itself: or in case said party of the second part, its successors or assigns, should forfeit its said rights, privileges and franchises in, upon and through said park, or from any cause cease to have, maintain or enjoy the same, then it is hereby covenanted and agreed that the party of the third part shall not also be excluded from said park, but shall, with its successors and assigns, continue to have, maintain and enjoy all of said rights, privileges, immunities, franchises, improvements and property, on the terms hereinbefore set forth, continuously and forever."

Tripartite agreement, continued.

The thirteenth paragraph provides that the Kansas City Road shall have no depot in the park. The fourteenth paragraph, in so far as it is material, is as follows:

STATEMENT.

"Now, therefore, in consideration thereof and of the agreement of the party of the third part herein, the party of the first part herein accepts the agreement and contract of the party of the third part herein to execute, perform and comply with all of the terms, provisions and things herein mentioned to be done, performed, or complied with as to said improvements, except as aforesaid by the party of the second part hereto, so far as assumed as aforesaid, releasing it therefrom, and in consideration thereof the party of the third part hereto covenants and agrees with the other parties hereto that it will, in lieu and stead of the party of the second part hereto, do, perform, and comply with all the terms and provisions, matters and things herein expressed to be done, performed or complied with by said party of the second part as to said improvements, except as aforesaid, subject to the terms and conditions in said agreement of even date herewith contained; and it is hereby expressly covenanted and agreed that a compliance by the party of the third part, for itself or for itself and the party of the second part jointly, in the construction of said railroad in, upon and through said park, tunnel and cut in accordance with the terms of this agreement, shall be taken and accepted as a performance of the conditions imposed upon said party of the second part; and it is expressly covenanted and agreed that all and every part of the work, its kind, description and extent, to be performed by either of said parties of the second or third parts is hereinabove expressed, and neither of said parties shall be held or required to do or perform any other or further work and conditions than those hereby definitely set forth."

The last clause of the contract provided that neither of said railroad companies should be required to supply any material, or do any of the work necessary to construct or maintain either of the arched entrances into or exits from said park,

but that all the work and material required in the construction of said arches should be paid by the Park Commissioners.

The foregoing contract was signed by the parties, but it was never acknowledged as a deed. It was afterwards, in 1879, recorded in the office of the County Recorder.

Kansas City Co acquires additional right of way and constructs road through park and into City.

Seventh. The evidence shows that after the execution of the foregoing deeds and contracts, the Kansas City Company acquired from divers parties the necessary additional right of way between the park and Union Depot, and proceeded to construct and put in operation its road through the park, tunnel and cut and on down to the Union Depot in the city; the road through the park being on the line established by the tripartite agreement. The evidence also shows that at the same time the Park Commissioners proceeded with the work referred to in the last clause of the preceding contract, and that they expended for material and work on the arched entrances or exits, rendered necessary by the presence of the railroad through the park, and in the erection of walls for the tunnel in the park, nearly forty thousand dollars. The evidence shows that the road through the park was completed in 1876 by the Kansas City Company, and that the County Company having failed in the performance of all its covenants, and having failed to refund to the Kansas City Company any portion of the cost of constructing the road through the park, it (the

County Company) lost and abandoned all claim to the right of way and road-bed through the park, tunnel and cut, and that the Kansas City Company thereupon under the terms of the agreement, took sole control of the road through the park, tunnel and cut. Afterwards in 1878, it acquired by purchase from third parties all the property and rights of way of the County Road between the park and the Union Depot.

County Co. abandons its rights in park.

Eighth. In 1879 the Kansas City Company was consolidated with the Wabash Railway Company and took the name of the "Wabash, St. Louis & Pacific Railway Company," and for convenience the consolidated company is hereafter called the "Wabash Company." The Wabash Company assumed all the obligations of the Kansas City Company, and in so far as this controversy is concerned the consolidation was only a change of name.

Kansas City Co. consolidated with Wabash

Ninth. In 1880 the Wabash Company conveyed its property in trust to the Central Trust Company of New York and James Cheney to secure a series of bonds, eighteen million dollars of which were issued and sold. In 1884 the Wabash Company became insolvent, and Solon Humphreys and Thomas E. Tutt were, by the Circuit Court of the United States for the Eastern District of Missouri, appointed receivers of its property, and afterwards bills were filed by the Central Trust Company and Cheney to foreclose said mortgage.

Wabash Co. makes mortgage to Central Trust Co. and Receivers are appointed.

STATEMENT.

Colorado Co. demands use of line.

Tenth. In 1886 while Humphreys and Tutt, receivers, were in possession of the Wabash property, respondent (St. Louis, Kansas City & Colorado Railroad Company), having constructed a line of railroad connecting with the Wabash at north line of Forest Park and of the same gauge, demanded of the receivers, permission to run its cars over the Wabash tracks through the park and down to the Union Depot in the city, which Union Depot was in August 11, 1875, and has since continued to be the only general passenger depot reached by all railroads entering the city. Respondent contended that it was entitled to this right under the contracts aforesaid and particularly under the provisions of the ninth and subsequent clauses of the tripartite agreement. The claim made by respondents was denied by the receivers and thereupon the Colorado Company and the City of St. Louis filed their intervening petitions in the cause wherein the receivers had been appointed, setting forth the facts above stated, and praying the Court to enjoin and restrain the Wabash Company and the receivers from interfering with its use of said property. The City of St. Louis joined in the proceeding as the successor of the Park Commissioners, the park having by appropriate legislation been brought within the jurisdiction of the city. The prayer of the petition was as follows:

Bill filed.

Prayer of bill.

"Your orators pray that a writ of injunction issue out of and under the seal of this Honorable Court enjoining and restraining the said Wabash,

St. Louis & Pacific Railway Company, and said Solon Humphreys and Thomas E. Tutt as such receivers, and each of them and their agents, servants and counselors and employes from in any manner refusing to permit the St. Louis, Kansas City & Colorado Railroad Company, under such reasonable regulations and terms as to the Court might seem proper, from using the said right of way of said Wabash, St. Louis & Pacific Railway Company, commencing at the north line of said park, where the railway of said Wabash, St. Louis & Pacific Railway Company enters said park, thence over said right of way to said Eighteenth street (the Union Depot) in said City of St. Louis by running its engines and cars over and upon said right of way, including the tracks of said Wabash, St. Louis & Pacific Railway Company between the points at said Union avenue and said Eighteenth street." (Printed Record, p. 164.)

Answer.

In their answer the Wabash Company and receivers admitted the execution of the agreements, but denied that under them, or either of them respondent had any right to use any portion of the Wabash tracks or right of way through the park, or between the park and Eighteenth street. The answer then stated the facts concerning the execution of the general mortgage by the Wabash Railway Company in 1880 to the Central Trust Company and Cheney; averred that the Wabash Company had made default in the payment of interest on its bonds and that by the terms of said mortgage said trustees were entitled to possession of said property; that said Receivers were in possession of said railroad under said mortgage for the benefit of the holders of said mortgage bonds, and

that neither said bondholders, trustees nor receivers were privy to or bound by any agreement or contract made by the County Company with said Park Commissioners, with respect to the use of its railroad through said park or elsewhere, by other railroad companies. The answer then denied that petitioners were entitled to the relief prayed for, and set up the several defenses stated and relied upon by appellants in their brief and argument. (Printed Record, p. 170.)

Master's report.

Eleventh. On the issues thus presented the case went to a Special Master, who reported in favor of the claim made by the petitioners. Considerable testimony was taken by the Master, but it related almost entirely to matters affecting the compensation to be paid by petitioners for the use of the tracks and property in question, and it is unnecessary to refer to that portion of it in detail. The following testimony of witnesses, on other points, was given:

Evidence.

S. T. Emerson, Chief Engineer in charge of the construction of the Kansas City Road from the Union Depot to the north line of the park, testified (page 84 of Printed Record) as follows:

Q. Now from that point (Forsythe Junction) to the Union Depot, what is the most, or the only practical entrance to the depot from that point? A. The Wabash Railroad.

Mr. Emerson also testified (page 72 of Record) as follows:

STATEMENT.

Q. How many tracks, if any, are on the right of way where the Wabash Railway now enters the park from Eighteenth street, the thirty feet from Eighteenth street to the park and the forty-two feet through the park? A. There are occasional places where there is a side track. There could not be but one track besides the main track on the thirty feet.

Andrew McKinley, President of the Board of Forest Park Commissioners at the time the tripartite agreement was made, testified (page 85 of Printed Record) as follows:

Q. What was the policy of the Board with reference to railroads passing through the park at the time of the execution of the tripartite agreement? A. There was a great deal of discussion and there was quite a controversy about where the road should run, under the provision which I have mentioned (referring to the act of Legislature, requiring the County Road to enter on the eastern side through Duncan's subdivision.)

Q. Please describe (page 86) the park to the Master, whether it has been improved, and if so, how, in a general way? A. The provisions contained in the proviso that I have just spoken of were intended to protect the park against the invasion of all railroads, unquestionably.

Q. What effect would the invasion of the park by railroads have upon the park for the purpose for which it was established? A. I think a very

damaging effect upon the point of use and upon the point of landscape.

Q. For what purpose was the park intended to be used principally—as a driving park? A. It is shown in the act itself to be dedicated to the people of the City and County of St. Louis for their enjoyment forever—that is, a pleasure ground for the people of St. Louis.

Q. Are there drives running through it? A. Yes, sir; nineteen and three-quarters miles of drives through the park.

Q. What effect would the penetration of the park by railroads at different points have upon the park as a driving park? A. Up to this time it

Evidence

was apprehended that the road would produce some great danger to persons visiting Forest Park, and it was a long time before that public impression was relieved of the apprehension that horses would be frightened, and hence there is a provision that the road shall be covered over with a cover or protected by trees. During the time I was President of the park it was not thought to be necessary.

Q. How much money has been expended in beautifying the park? A. $405,000 during my administration; since that time nothing. It remains as it was then.

Q. What does it represent in money to-day? A. In cash paid $1,300,000 and besides that sum contributions made by the city since. The interest on that sum, of course, is to be added. The bonds are thirty-four year bonds.

CROSS-EXAMINATION.

Q. Now, the expenditures by the Park Commissioners were in the erection of masonry composing these two arches and the principal viaduct through which the people enter the park. It was in the masonry composing those structures? A. Yes, sir; there would have been no necessity for them, except for the railroad.

Q. They were made necessary to the railroad? A. Yes, sir.

Q. They were for the convenience of persons passing in and out of the park? A. Yes, sir.

Q. Without the railroads there would be no necessity for the culverts; they were the entrances for carriages and footmen? A. Yes, sir.

A. A. Talmage, General Manager of the Wabash Company, testified (p. 115 Printed Record) as follows:

Q. Would it be practicable for any other road subject to your rules and regulations to use the track from the north line of the park to the depot—I mean the main track? A. It could be done under the rules and regulations of this company, but usually it is done by substituting the motive power and trainmen of our own road to handle the trains of foreign roads.

Twelfth. Appellants excepted to the report and findings of the Master on various grounds, which need not be here given in detail. (For exceptions see Printed Record, p. 226.) Exceptions filed.

Thirteenth. The exceptions were argued before the Court and the Court held, that under the contracts, respondent (the St. Louis, Kansas City & Colorado Railroad Company) had the right to use on such terms and subject to such regulations as to the Court seemed equitable the Wabash tracks through the park, and from the park down to the connection with the Union Depot tracks at Eighteenth street in the city, and on those points it overruled all exceptions and confirmed the Master's report. The Court differed, however, with the Master on the question of compensation to be paid by petitioners, and sustained the exceptions of appellant on that point. (For opinion see Printed Record, 285.)

Exceptions overruled.

Fourteenth. The Court then entered a decree finding that the equities were with the intervenors and that they were entitled to the relief prayed for, and fixing the compensation to be paid by intervenor for the use of the right of way and tracks, side tracks, switches, turn-outs, turn-tables and other terminal facilities of the Wabash Railroad, between the north line of Forest Park and Eighteenth street in the City of St. Louis, at $2,500 per month.

Decree.

The decree then proceeds as follows:

"And the Court doth further find, adjudge, and decree that the expense per annum of maintaining the said right of way and other property perding such joint use thereof, including therein all taxes upon said property, shall be borne by the said Wabash, St. Louis & Pacific Railway Company

and the said intervenor, The St. Louis, Kansas City & Colorado Railroad Company, in proportion to the number of wheels each of said companies shall cause to be passed over the main track or parts thereof on said right of way per annum bears to the total number of wheels that both of said companies shall cause to be passed over the same during each year pending the said period of such joint use, and that this expense shall be paid at the expiration of each year. The said right of way and tracks thereon and other terminal facilities shall be maintained and kept in good repair by the Wabash, St. Louis & Pacific Railway Company.

"And the Court doth further order, adjudge and decree that the running of all trains, engines, or cars of said intervenor, the said St. Louis, Kansas City & Colorado Railroad Company, over said right of way and tracks, and the use of said right of way, road, terminal facilities, and other property specified as aforesaid, shall conform to the rules and regulations now in force, and such other reasonable rules and regulations as may hereafter be adopted by the said Wabash, St. Louis & Pacific Railway Company, or its said receivers, to enable said intervenor to fully enjoy the benefits of this decree, and that the trains of said railroad company, intervenor, shall be so regulated as that at least eight minutes shall, if deemed necessary, intervene between its trains and the trains of the said Wabash, St. Louis and Pacific Railway Company, at any point between said north line of Forest Park and Eighteenth street, and that the sole control and regulation of the running of the trains of the said companies shall be under this decree in the Wabash, St. Louis & Pacific Railway Company and its receivers, and subject to the further order of this Court.

"And the Court doth further order, adjudge and decree, that in all respects, subject to the terms of this decree, the said Railroad Company, intervenor, shall enjoy the equal use and benefit of said right of way, tracks, switches, sidetracks, turnouts, turntables, and other terminal facilities with said Wa-

Decree.

bash, St. Louis & Pacific Railway Company or its said receivers, and the said Wabash, St. Louis & Pacific Railway Company and Solon Humphreys and Thomas E. Tutt, as such receivers, and said Central Trust Company of New York and James Cheney and all persons claiming by, through or under them and each of them respectively and their agents, servants, counsellors, and employees be, and the same are hereby perpetually enjoined and restrained from in any manner refusing to permit the said intervenor, the said St. Louis, Kansas City & Colorado Railroad Company, its successors or assigns, and its or their officers, agents or employes from using with it or their engines, cars (loaded or empty), the said right of way, tracks, switches, side tracks, turnouts, turn-tables and other terminal facilities of said Wabash, St. Louis & Pacific Railway Company between the north line of said Forest Park and said Eighteenth street on the terms hereinabove set forth in this decree in and for the transacting of its or their business and in the operation of its or their road.

And the said intervenor, the St. Louis, Kansas City & Colorado Railroad Company, by its officers, agents and employes and each of them, is hereby authorized and permitted, with its right of way, road, tracks and property, engines and cars, loaded or empty, to make connection with said Wabash, St. Louis & Pacific Railway Company at the north line of said Forest Park and to use the said right of way, tracks, switches, side tracks, turnouts, turntables, and other terminal facilities of said Wabash, St. Louis & Pacific Railway Company or anyone claiming by, through or under it as to the same between the north line of said park and Eighteenth street on the terms, in the manner, and subject to the regulations in this decree set forth in and for the transaction of the business and in operation of the road of said St. Louis, Kansas City & Colorado Railroad Company, its successors or assigns, and said Solon Humphreys and Thomas E. Tutt, receivers, and all agents, servants or persons by them engaged or acting with or for them, said Central

Trust Company and James Cheney, said Wabash, St. Louis & Pacific Railway Company, and all persons claiming by, through or under said last named company, are hereby restrained and enjoined from in any wise obstructing, preventing, interfering with, or refusing to comply with the permit and privilege hereby ordered, adjudged and decreed."

Rules adopted

The rules in force upon the Wabash Road, and which were adopted by the decree, for the government of the parties in the use of the property, are found in "Exhibit D" on page 102 of printed Record.

Fifteenth. Under the foregoing decree respondent entered upon the use of appellant's track through the park and its sidetracks, turn-tables and terminal facilities at the Union Depot.

Sixteenth. On the day the decree was entered, James F. Joy, Thomas H. Hubbard, Edgar T. Welles and O. D. Ashley filed their petition in the cause, reciting the execution of the Wabash mortgage of June 1, 1890, to the Central Trust Company and Cheney as trustees; stating that there had been a foreclosure of said mortgage and a sale of the mortgaged property on the 26th day of April, at which they had become the purchasers; stating that the sale to them had been duly confirmed by the Court and that proper deeds had been made conveying to them the right of way, railroad tracks, terminal facilities and other property, the use of which intervenor was seeking to acquire in this proceeding; that said property was still in the posses-

Joy and associates made parties.

sion of and being operated by said receivers; stating that as such purchasers they had an interest in the property and subject matter of the litigation, which they desired to protect by an appeal to the Supreme Court of the United States and asking that they be made parties defendant, and that they be allowed an appeal to the Supreme Court of the United States. And the Court thereupon entered an order, on said day, reciting the petition, and that it appearing to the Court that said James F. Joy, Thomas H. Hubbard, Edgar T. Welles and O. D. Ashley were the owners of the premises and right of way theretofore owned by the Wabash, St. Louis & Pacific Railway Company, between the north line of Forest Park and across the park to Eighteenth street in the City of St. Louis, over which intervenor was seeking to obtain a right to run its engines and cars, it was therefore ordered that said purchasers be made parties defendant in said cause. (Printed Record, pp. 279–281.)

Appeal allowed

An appeal to this Court from the foregoing decree was afterwards allowed and duly perfected.

ASSIGNMENT OF ERRORS.

I.

The Court erred in holding that the covenants on the part of the County Railroad Company to permit other railroads to use its right of way between the park and the terminus of its line in the city, was binding on the Kansas City Company, and gave respondent the right to use the right of way and tracks afterwards acquired and constructed by the Kansas City Company between the park and the city.

II.

The Court erred in holding and decreeing that the covenant of the County Company—to the effect that "it would permit other railroads to use its right of way between the park and the terminus of its road in the city"—created an equitable easement in the road between the park and the city which affected that property in the hands of Joy and others, as purchasers from the Kansas City Company.

III.

The Court erred in holding and decreeing that a covenant on the part of the County Company "to permit other railroads to use its right of way under

such reasonable regulations and upon such terms and for such fair and equitable compensation to be paid therefor as might be agreed upon by such companies." constituted an agreement sufficiently definite to be specifically enforced in a court of equity.

IV.

The Court erred in entering a decree compelling the specific performance, by the Wabash Company, of a continuous duty requiring the exercise of skill and personal judgment, as well as the constant expenditure of money, and requiring the Court to retain perpetual control over the cause in order to superintend the execution of the decree, and make, from time to time, such changes in the rules and regulations adopted, as the circumstances of the parties and the shifting contingencies of business and trade shall render necessary.

V.

The Court erred in entering a decree broader than the contract. The County Company only agreed, at most, to permit other railroads to use "its right of way," while the decree gives respondent the right to use "the right of way and tracks, side-tracks, switches, turnouts, turn-tables, and other terminal facilities of the Wabash Company."

VI.

The Court erred in holding that mutuality of equitable remedy existed between the parties to the suit.

VII.

The Court erred in holding that the contract of the County Company to permit other railroads to use its right of way, was binding on Joy and his associates, they being purchasers, in good faith and without notice, under the mortgage made by the Wabash Company in 1880.

BRIEF.

I.

The Court erred in holding that the covenants on the part of the County Railroad Company to permit other railroads to use its right of way between the park and the terminus of its line in the city, was binding on the Kansas City Company, and gave respondent the right to use the right of way and tracks afterwards acquired and constructed by the Kansas City Company between the park and the city.

Our contention is, that the provision at the end of the twelfth paragraph of the *tripartite agreement* to the effect that "if the County Company should forfeit its rights, privileges and franchises *upon and through the park*, such forfeiture should not affect the rights of the Kansas City Company, but that the Kansas City Company should continue to have, maintain and enjoy all of said rights, privileges, immunities, franchises, improvements and property on the terms thereinbefore set forth, continuously and forever,"—only relates to the right of way *through the park*, and that it has no reference to anything between the park and the city.

To determine whether the Kansas City Company ever agreed to let other railroad companies use its

right of way *between the park and the city*, we must consider the situation of the parties at the time the contract was made, the subject-matter of the contract and the language they employed. A glance at the record shows, that when the parties came together to make the agreement, the County Company was, through its deed from Griswold, the owner of a right of way through the park forty feet in width, and not only that, but the rights granted in the Griswold deed had been fortified and recognized by the emphatic declaration found in the *third section* of the Act establishing the park, to the effect that "nothing in said Act contained should prevent the St. Louis County Railroad Company from using and occupying a right of way of the width of not more than *seventy feet* through the northeastern portion of said park. * * * Provided that the grade of said railroad, as far as the same runs through the park, shall be approved by the Park Commissioners."

It being a fact, conceded by all parties, that the County Company had a right of way through the park, and that the County Company had previously, but on the same day, made a contract with the Kansas City Company to the effect that it (the County Company) would, among other things, convey to the Kansas City Company "an undivided one-half of all the right of way, privileges and franchises then owned by it in, through or upon Forest Park," the three parties in interest met together to make the agreement in

question. The agreement recites that the County Company was selling to the Kansas City Company a portion of its property; it recites that the Kansas City Company was making the purchase with the intention of proceeding at once with the construction of the road *through the park;* a line *upon a certain grade* through the park was designated upon a plat and profile (not exactly the line described in the Griswold deed but within the limit fixed by the Statute), and in the first paragraph of the agreement it was declared that the Park Commissioners "accepted the *line and grade* laid down upon said plat and profile, and that they fixed said line as the finally established right of way to which the said County Company was entitled by Statute or otherwise, *through the park* or any part thereof."

The contract then proceeded to define in eight paragraphs the manner in which the *County Company* should construct and operate the road *through the park*. The ninth paragraph is as follows:

"Said party of the second part (the County Company) shall permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park and up to the terminus of its road in the City of St. Louis, upon such terms and for such fair and equitable compensation to be paid to it therefor as may be agreed upon by such companies."

The tenth and eleventh paragraphs are not material to this part of the controversy. The twelfth

paragraph is important, but when stripped of its bewildering verbiage, is as follows:

First. It recites the fact that to enable the Kansas City Company to reach the Union Depot, it (the Kansas City Company) had previously made an amicable arrangement with the County Company for a right of way outside of and through the park, under which contract the right of way *through the park* was to be used by them in common on the terms set forth in the previous agreement between the companies.

Second. It recites the fact that the Kansas City Company was about to construct the road *through the park* at great expense and assume other heavy burthens to be of advantage to it (the Kansas City Company) through the continued enjoyment of said right of way *through the park.*

Third. It declares that as an *inducement* for the Kansas City Company to proceed as intended, the Park Commissioners conveyed unto and licensed and permitted it to occupy the right of way *through the park* in common with the County Company on the terms of the previous contract between said companies, and on the same terms and conditions that were thereinbefore (in the tripartite agreement) imposed upon the County Company, except as to improvements.

Fourth. The paragraph ends by declaring that "in case the County Company should forfeit

its rights *through the park*, or cease to enjoy the same, the Kansas City Company should not also be excluded *from said park*, but that it should continue to enjoy all of said improvements and property (manifestly the improvements and property in the park) on the terms thereinbefore set forth continuously and forever."

Now, in case the County Company forfeited its rights *through the park*, the inquiry is as to what property the Kansas City Company was to continue to enjoy *on the terms thereinbefore set forth?* Was it the property *in the park*, or was it property *between the park and the Union Depot?*

It is obvious that the other two parties to the agreement intended, by the last clause of the twelfth paragraph, to say to the Kansas City Company, that *as an inducement* for it to proceed with the work of constructing the line *through the park*, and that in case it did make the expenditures contemplated, it should not afterwards be excluded *from the park* in consequence of any future forfeiture or failure on the part of the County Company to fulfill its covenants. The idea was, that if the Kansas City Company constructed the line *through the park*, it was to continue *in the park* on the same terms imposed upon the County Company.

In the whole twelfth paragraph there is no reference made to any right of way or property outside the park, and certainly, if the parties had intended to make a forfeiture by the County Company, of its rights *in the park*, a condition upon

which other railroads might use the right of way of the Kansas City Company *between the park and the City*, they would have so expressed it. They would not have left so important a matter to be settled by argument or inference. It was the right of way *through the park* that was in the minds of the parties and about which they were contracting, and when they said that a forfeiture by the County Company of its rights *through the park* should not affect the rights of the Kansas City Company, and that the Kansas City Company should continue to enjoy said privileges and property, "on the terms thereinbefore set forth, they meant the property *in the park* and not property *outside the park*. Therefore, no matter what view the Court may take of the decree with respect to other matters, it was erroneous for the Court to extend the decree over any portion of the track of the Kansas City Company lying *outside the park*.

II.

The Court erred in holding and decreeing that the covenant of the County Company—to the effect that "it would permit other railroads to use its right of way between the park and the terminus of its road in the city—created an equitable easement in the road between the park and the city which affected that property in the hands of Joy and others, as purchasers from the Kansas City Company.

The record shows the following facts:

First. It is conceded that the County Company acquired a right of way forty feet in width through the park, under its deed from Griswold.

Second. That a right of way seventy feet in width, through the park, was reserved to the County Compay by the third section of the Park Act.

Third. The Park Act shows that the only powers conferred upon the Commissioners with respect to the railroad in the park, was the power *to approve its grade.*

Fourth. The Record shows that the Park Commissioners did not at any time in any deed or contract grant, or attempt to grant to the County Company any right of way in the park.

Fifth. It shows that the Kansas City Company acquired its rights in the park (as well as some rights of way outside the park) under the deed executed to it by the County Company for $125,000.

Sixth. It appears that after the Kansas City Company had acquired its title, as aforesaid, the Park Commissioners, without possessing any statutory authority to make a grant, declared in the *twelfth* paragraph of the tripartite agreement, that *as an inducement* (not as a consideration) for the Kansas City Company to proceed with the construction of its road *through the park*, they granted

unto and licensed and permitted the Kansas City Company to hold, use and enjoy the right of way through the park jointly with the County Company; and

Seventh. It is an admitted fact that the Kansas City Company (under the name of the Wabash Company) afterwards mortgaged the right of way and property in the park, with that between the park and the city to the Central Trust Company, and that through a foreclosure of that mortgage, Joy and his associates derive their title.

Now it has not been heretofore seriously contended, and we do not suppose it will be now urged, that the covenant of the County Company, to the effect that it would permit other railroads to use its right of way *between the park and the city*, was a covenant "which run with that property." But, on the contrary, the contention has been, that the covenant of the County Company, to the effect that other companies *might use its right of way* between the park and the city, created an "equitable easement" which run in favor of the Colorado Company and gave it the right to use the property *between the park and the city*. It was on that theory that the court below entered the decree of which we complain.

No distinction was made or recognized in the opinion of the court, or in the decree, between the right of way and property *in the park*, and the

right of way and property *outside the park*, and yet we believe they present totally different questions.

An equitable easement is said to be a right without profit, which the owner of one tract of land has, to restrict or regulate, for the benefit of his own tract, the uses to be made of another contiguous tract. There must, of course, be two estates, a *dominant* and a *servient* estate, and in order to create an equitable easement, or an easement which only a court of equity can enforce, the burden or duty imposed on the servient estate, must be for the benefit of the dominant estate. The covenants must "touch or concern" or "extend to the support of the dominant estate." They must be "for the benefit of the dominant estate."

As said in *Whitney vs. Union Ry Co.* (11 Gray, 359):

"The validity of such agreements have been recognized and established, and their performance enforced in equity as against subsequent purchasers with notice, upon the ground that such stipulations create an easement, or privilege, in the land conveyed for the use and benefit of the grantor and those who may afterwards claim under him, as owners of adjacent land of which the land granted originally formed a part. . In such cases, although the covenant or agreement in the deed, regarded as a contract merely, is binding only on the original parties, yet in order to carry out the plain intent of the parties it will be construed, as creating a right or interest in the nature of an incorporeal hereditament or easement appurtenant to the remaining land belonging to the grantor at the time of the grant, and arising out of and attached to the land

part of the original parcel, conveyed to the grantee."

Jenks vs. Williams, 115 Mass. 217.
Jeffries vs. Jeffries, 117 Mass. 184.
Narcross vs. James, 140 Mass. 188.

These cases hold that when a party conveys a portion of his lands, and the grantor *accepts a covenant back from his grantee*, to the effect that neither he nor his assigns will use the land granted for a purpose prejudicial to the property retained, that such covenants, although they cannot be strictly said "to run with the land," nevertheless create in the grantor and his assigns "equitable easements" in the lands conveyed for the benefit of the lands *not conveyed*, and courts of equity have, therefore, enjoined the covenantor from violating the covenant *to the prejudice* of the covenantee and his assigns.

In the foregoing cases, as well as in all that are cited and relied upon by respondent, it will be found upon examination that the covenants which were enforced were contained in deeds of grant, and that they concerned *the use of property granted*, in its relation *to the property retained*. The personal covenants of the grantees were, in those cases, regarded as creating easements in the lands granted which would be enforced in equity, although at law they were not covenants which run with the land.

Now, we concede that there are circumstances under which the covenant in question might be enforced *if the bill had been filed against the County Company* (covenantor) and had only re-

lated to *the right of way in the park*. If the bill had only related to the right of way in the park, and it could be truthfully said that the County Company acquired its right of way *through the park* under a *grant from the Park Commissioners*, and the Court could furthermore see that to enforce the covenant *would be beneficial to the park*, then we think the case would come under the rule announced in the cases above cited.

But when it comes to the right of way *outside the park* our contention is, that the doctrine of equitable easement has no application, and that as to the property *outside the park* the covenant of the County Company, with respect to its use by other companies, was merely personal.

The principle for which we contend, with respect to the property *outside the park*, is illustrated in the case of *Des Moines & Fort Dodge Railway Company vs. Wabash, St. Louis & Pacific Railway Company* (135 U. S. 576).

In that case the "Adel Railroad Company" entered into a contract with the "Fort Dodge Company," under which the Adel Railroad Company, for a sufficient consideration, agreed for itself and its assigns, to deliver to the Fort Dodge Company, at Waukee, for a period of twenty years, all its freight and passengers destined for Des Moines. Of course, such a contract was of great value to the Fort Dodge Company, as it fed its railroad and was in that respect beneficial to it. Not only that, but the contract further provided,

that any damages for a breach of the same should "be a continuing lien upon the roads of the two contracting companies, their equipment and income unto whosesoever hands they might come."

Soon after the contract was made the Adel Company sold its road to the Wabash Company. The Wabash Company not only knew of the contract, but it actually covenanted with the Adel Company that it (the Wabash) would either perform the contract or save the Adel Company harmless in regard to it. The Wabash Company did not perform the agreement and this Court held (affirming the judgment of the Circuit Court) that the agreement of the Adel Company was a mere personal obligation and did not confer any right in the Fort Dodge Company to enforce the performance of the contract against the Wabash, and that the bill was properly dismissed.

In *Narcross vs. James* (140 Mass. 188), one Kibbe conveyed to Flynt a valuable quarry, bounded by other lands of the grantor. The grantor covenanted in his deed as follows:

> "And I do for myself, my heirs, executors and administrators covenant with the said Flynt, his heirs and assigns, * * * that I will not open or work, or allow any person or persons to open or work any quarry or quarries on my farm or premises."

By mesne conveyance the plaintiff became possessed of the quarry conveyed to Flynt and the defendants of the surrounding land referred to in

the covenant. The defendants began quarrying stone on their land, and the plaintiff filed a bill for an injunction. After a careful review of the authorities on the subject of equitable easements, the Court dismissed the bill, and in the course of its opinion (p. 192) it said:

"The covenant under consideration, as it stands on the report, falls outside the limits of this rule, even in the narrower form. In what way does it extend to the support of the plaintiff's quarry? It does not make the use or occupation of it more convenient. It does not in any way affect the use or occupation; it simply tends indirectly to increase its value, by excluding a competitor from the market for its products. If it be asked what is the difference in principle between an easement to have land unbuilt upon, such as was recognized in *Brooks vs. Reynolds*, 106 Mass. 31, and an easement to have a quarry left unopened, the answer is, that, whether a difference of degree or of kind, the distinction is plain between a grant or covenant that looks to direct physical advantage in the occupation of the dominant estate, such as light or air, and one which only concerns it in the indirect way which we have mentioned. The scope of the covenant and the circumstances show that it is not directed to the quiet enjoyment of the dominant land."

The case of *Keppel vs. Bailey* (2 Mylne & K. 517) also strongly illustrates the same principle.

Again, if covenants do not run with lands, it is *only when they are restrictive* and relate to the lands granted, that they will be enforced even in equity against assignees with notice.

It is said in many cases, and the rule seems now firmly established, that courts of equity will not enforce *against the grantee of the covenantor*, who has himself entered into no covenant, any covenant of his grantor, which does not run with the land and which requires the expenditure of money.

~~*Moreland vs. Cook*, L. R. 8 Eq. 259.~~
Haywood vs. Brunswick Building Society, 8 Q. B. D. 403.
London & Southwestern Railway vs. Gomm, L. R. 20 Ch D. 562.

Therefore, in so far as the decree gives to the Colorado Company the use of the right of way outside the park, it should be reversed for the following reasons:

First. Because the covenant concerning the right of way outside the park was not connected with any grant. In other words, the right of way outside the park was no part of the property granted, and the covenant created no "equitable easement" in favor of any *dominant* estate.

Second. Because a decree enforcing a covenant of the County Company (or even of the Kansas City Company), to permit other railroads to use its right of way *outside the park*, would not be of any "direct physical advantage" to the park. After the trains of the Colorado Company leave the park, the question of how they shall get to the Union

Depot is a matter of no concern to the owners of the park; and,

Third. Because the decree requires the performance of continuous affirmative acts by Joy and his associates, who take as purchasers from the Kansas City Company, and such covenants are never enforced against assignees.

III.

The Court erred in holding and decreeing that a covenant on the part of the County Company "to permit other railroads to use its right of way under such reasonable regulations and upon such terms and for such fair and equitable compensation to be paid therefor as might be agreed upon by such companies," constituted an agreement sufficiently definite to be specifically enforced in a Court of equity.

A party who merely agrees to permit another at some future time to enter upon and use a given piece of property *on such terms and for such compensation*, as may, when the time arrives, be agreed upon does not part with any interest in his estate or impair his dominion over it. The mere right in one party to use the property of another *on such terms as may be agreed upon*, gives the covenantee no interest in the property. One gets nothing by such a contract. He had the same privilege before the contract was made.

So, when the *ninth* and *tenth* paragraphs of the tripartite agreement are read together it will, we

think, be seen that the *ninth* paragraph was only intended to be *permissive*. It was only intended, as we think, to confer on the County Company *the privilege of permitting* other railroad companies to use its right of way through the park, on such terms as might be agreed upon, without asking the consent of the Park Commissioners; while the *tenth* paragraph reserved, to the Park Commissioners, the right to grant other rights of way, through the park, to other railroad companies without the consent of the County Company.

But, however that may be, the language of the *ninth* clause is clearly too indefinite to be considered a contract. The reservation of the right, in the County Company, to fix *the terms* on which another company might use its property, as well as the right to fix *the compensation* which such party should pay for such use, was reserved, *as a right*, to the County Company, and why should so valuable a right be ignored or stricken down in a court of equity? Courts of equity do not make bargains for parties, or compel them by injunction to make bargains for themselves. When a party reserves to himself the right to make his own contracts, no court, or other tribunal, can rightfully make them for him.

Now, in this case, the *regulations*, *compensation* and *terms* on which the property was to be used, were all left by the contract to the future determination of the parties, and the question is, as to

whether a court of equity ought to put itself in the place of the parties and supply not merely some subordinate missing term, but make, in fact the whole agreement. Or in other words, can a court of equity, *under the guise of enforcing a contract*, *make* the contract which it enforces, and in so doing, fix the terms on which one party may use the property of another, when the very contract in question leaves the matter of fixing the terms to the parties themselves? Can a court of equity do that?

In *Colson vs. Thompson* (2nd Wheaton, 336), it was said:

"In order to obtain a specific performance of a contract, its terms should be so precise that neither party could reasonably misunderstand them. If a contract is vague or uncertain, a court of equity will not enforce it, but will leave the party to his legal remedy."

See also *Hennesy vs. Woolworth*, 128 U. S. 438.

In his work on Contracts (Specific Performance, Sec. 159), *Mr. Pomeroy* states the general rule as follows:

"A greater degree of certainty is required in the terms of an agreement which is to be specifically executed in equity than is necessary in a contract which is to be the basis of an action at law in damages. An action at law is founded upon the mere non-performance by the defendant, and this negative conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity is wholly an affirmative

proceeding. The mere fact of non-performance is not enough; its object is to procure a performance by the defendant, and this demands a clear, definite and precise understanding of all the terms. They must be exactly ascertained before their performance can be enforced."

The following cases serve to further illustrate our position:

In *McKibben vs. Brown* (1st McCarter, 14th N. J. Eq. 13), the complainant leased of the defendant an hotel with its furniture for one year, for eight thousand dollars. The agreement contained a stipulation, that if the complainant should keep the hotel in a proper manner he should have the privilege of keeping it another year (exclusive of the furniture), upon the same terms, except that the rent should be seven thousand dollars per annum, and that if the complainant remained he should purchase the furniture at the cost price, less two hundred and fifty dollars, and that "*the times and credits to be given by the defendant to the complainant should be the subject of arrangement between the parties.*" In refusing to decree a specific performance of the agreement the Court said:

"The Court is therefore asked to decree a specific performance of the agreements, and that the defendant among other things shall sell and transfer the said furniture to the complainant for the ascertained price, *for such times and credits of payment as the Court shall deem reasonable and just*, according to the agreement. Is such a decree within the power of this Court? By the terms of the agreement it is stipulated, that the times and credits to be given shall be the subject of arrangement

between the parties. The Court are now asked to carry that contract into execution, and in so doing to direct that the times and credits shall be such, not as the parties agreed upon, but such as this Court shall deem reasonable and just. Now, upon the very face of the transaction, is it not apparent that this is asking the Court, not to enforce the specific performance of an agreement made by the parties, but to make an agreement for them? Is it not in direct violation of the agreement? The times or credits are stipulated to be such *as the parties themselves shall assent to.* Each party reserved to himself the right of control of that matter, neither consented to trust it to the judgment of this Court, or to any other tribunal.

"Suppose the stipulation had been that the furniture should be taken at such price *as the parties might agree upon.* If the parties could not agree, or would not agree, could this Court enforce the performance of the contract for such price as the Court might deem reasonable? Is a contract for sale at a fixed or contract price tantamount to a contract for sale upon a *quantum valabat?* A price fixed by the parties may be, and often is, deemed competent evidence of what the goods are worth, but the fair value of the goods never has been and never can be evidence of a contract price.

"Or, suppose again, that the contract had been that the lease should be renewed *upon such terms as the parties should thereafter agree upon.* If the parties could not agree as to the terms, *could a court of equity be called upon to enforce the renewal of the lease upon such terms as the Court might deem reasonable and just?* Would not this principle if carried out enable this Court to enforce the performance of any contract, however imperfect in its terms? Would it not rather enable this Court to make contracts for the parties and compel them to submit to terms to which they never assented? No case, I think, can be found, certainly the researches of counsel have furnished none, which go the length of supporting the claim of the complainant's bill."

To the same effect *Nichols vs. Williams* (22nd N. J. Eq. 63).

In *Whitlock vs. Duffield* (1st. Hoffman Ch. 101), a lease contained a clause to the effect, that at the end of the term, buildings should be taken on a valuation, or the lessors would grant a new lease for the term of twenty years, *upon such terms as said lessors, their heirs, etc., might think proper and be approved by the tenant.* The agreement was held not enforcible; the Court saying:

"In the case before the Court the contract is not to renew the old lease, but to grant a new one for twenty years *upon such terms as the lessors shall think proper and the lessees shall approve.* I agree that this is equivalent to a covenant to grant a lease upon such terms as the parties may agree upon. It is precisely the same as though it was an original contract for a lease. The term is defined, but everything else, of rent and covenants, is left uncertain. As to those, we have the expressed decision of the Supreme Court, that at law it is void; and in the cases in this Court, which I have stated, there is no decision to support a bill for performance."

It was also said in that case, that "the utmost length to which the courts have gone, is that where there is an agreement to sell at a valuation and no mode of making it is fixed, the Court will do it in its ordinary manner; that such a contract implied the intervention of others to ascertain the value, *but that when the price was to be adjusted by the parties themselves, the interference of a court would be adding a material ingredient to the contract in a manner not impliedly consented to.*"

In *Huff vs. Shepard* (58 Mo. 242), a party contracted in writing to sell his house and furniture; the purchaser was to assume a certain debt due from the vendor, *and pay the balance of the purchase money "on such terms as might be agreed on between said parties."* The Circuit Court undertook to specifically enforce the contract, by rendering judgment against the defendant for $1,300, and in reversing that decree, the Supreme Court said:

"This was not enforcing the defendant's contract, for he never bound himself to any such cash liquidation without regard to time. It was enforcing a new agreement made for him by the Court and the plaintiff. So far as the defendant had bound himself at all, it was upon an express stipulation that the terms of payment should be only such as he might thereafter consent to in a further agreement. Time—being included in the terms—thus became of the essence of the contract.

"Such an undertaking to settle terms at a future day is beyond the reach of any decree for specific performance. The Court cannot compel the parties to agree. The remedy attempted would destroy the subject of treatment. In *Kemble vs. Kean* (6 Sim. 333), the Vice-Chancellor said: 'Can a man be compelled to act at a theatre by this Court sending him to the Fleet, where he cannot act at all?' So, in this proposition to compel a person to agree, the element of compulsion would annihilate in advance the thing it promises to create. For no contract can live in the law's atmosphere, unless born of voluntary choice of the parties."

The following English cases are to the same effect as those from which we have already quoted:

In *Morgan vs. Millman* (3d De G. M. & G. 24), a party contracted to sell certain lands to a railroad

company for such compensation as might be fixed, either by arbitration or a jury, as Sir Charles Morgan might choose. The amount was never fixed in either of these methods. In deciding the case, Lord Chancellor Cranworth said:

"Sir Charles Morgan never made his election either for the one or the other of those modes of proceeding, and therefore it is quite clear that the only point remaining in doubt, namely, the amount of the purchase money, never was ascertained by either of the modes that were pointed out. It has been suggested that this was immaterial; that the Court may ascertain it, or that some other step may be taken different from what the parties stipulated as the mode of ascertaining what the amount of the purchase money should be. I confess that upon principle, as well as upon authority, the Court cannot here, as it appears to me, take upon itself to do that; if there had been an agreement that the price should be that which was to be ascertained upon a fair valuation, then the Court might interfere."

In *Darby vs. Whittaker* (6th Drewry, 134), a party agreed to sell "the fixtures, furniture and effects in a beer house at such price as the same should be valued at" by two parties named. The Vice Chancellor in refusing to decree a specific performance said:

"Now I assume it to be clear that this Court has no power to decree a specific performance of a contract for sale or purchase at a price to be fixed by arbitration, unless the arbitrators have actually fixed the price."

In *Cooth vs. Jackson* (6th Ves. 33), Lord Eldon said:

"I am not aware of a case even at law, nor that a court of equity has ever entertained this jurisdiction, that, where a reference has been made to arbitration, and the judgment of the arbitrators is not given in time and manner, according to agreement, the Court have substituted themselves for the arbitrators, and made the award. I am not aware that has been done even in a case where the substantial thing to be done is agreed between the parties, but the time and manner in which it is to be done is that which they have put upon others to execute."

In *Milnes vs. Gery* (14th Ves. 406), there was an agreement to purchase at a price to be ascertained in a specified manner, and in refusing to decree a specific performance of the contract, the *Master of the Rolls* said:

"The more I have considered this case the more I am satisfied that, independently of all other objections, there is no such agreement between the parties as can be carried into execution. The only agreement into which the defendant entered was to purchase at a price to be ascertained in a specific mode, no price having been fixed in that mode, the parties have not agreed upon any price. Where then is the complete and concluded contract which the Court is called upon to execute? The price is of the essence of the contract of sale. In this instance the parties have agreed upon a peculiar mode of ascertaining the price. The agreement that the price shall be fixed in one specific manner, certainly does not afford an inference that it is wholly indifferent in what manner it is fixed. The Court declaring that one shall take and the other shall give a price fixed in any other manner, does not execute any agreement of theirs; but makes an agreement for them, upon a notion that it may be as advantageous as that they made for themselves. * * * * The Court has never gone the length

of compelling a party to buy or sell the whole subject matter of his agreement at a price that he has never fixed, and that was never fixed in any mode to which he has given his consent."

In *Kemble vs. Kean* (6 Sim. 296), there was a contract on the part of Kean to act at a certain theatre for twenty-five nights. In refusing to decree a specific performance of the agreement the Vice Chancellor said:

"Independently of the difficulty of compelling a man to act, there is no time stated, and it is not stated in what characters he shall act; and the thing is altogether so loose that it is perfectly impossible for the Court to determine upon what scheme of things Mr. Kean shall perform his agreement. There can be no prospective declaration or direction of the Court as to the performance of the agreement. * * * * There is no method of arriving at that which is the substance of the contract between the parties by means of any process which this Court is enabled to issue; and therefore, my opinion is, that where the agreement is mainly and substantially of an active nature, and is so undetermined that it is impossible to have a performance of it in this Court, and it is only guarded by a negative provision, this Court will leave the parties altogether, to a Court of law, and will not give partial relief by enjoining only a negative stipulation."

In *Taylor vs. Portington* (7th De G. M. & G. 328), there was a proposition on the part of the defendant to take a house "if put in thorough repair, and the drawing rooms decorated according to the present style." The proposition was accepted and bill filed to compel a specific performance. The Court held the contract too indefinite to be enforced.

The case of *Wilson vs. Northampton & Banberry Junction Railway Company* (L. R. 9th Ch. Ap. 279) was one in which it was sought to specifically enforce the performance of an agreement by which the promoters of the railway company, in consideration of the withdrawal of the plaintiff's opposition to their bill then pending before Parliament, agreed to erect a station and works upon the plaintiff's land. The part of the contract which referred to the station was as follows: "A station to be made on Nos. 24, 25 and 26, Parish of Wappenham, some part or parts thereof." The railway company, instead of constructing the station on plaintiff's land, began to construct one about two miles distant. Evidence was introduced to show, among other things, the great increase in value to plaintiff's land which would result from the construction and maintenance of the station if it should be built thereon.

The Vice-Chancellor (Bacon) declined to enforce specific performance, holding that it was a case for damages; and the Court of Appeals sustained his decision. In giving his opinion on the question of specific performance, the Vice-Chancellor said:

"Another reason is, that if I were to direct the erection of a station, I must specify either now, or it must be specified by means of an inquiry in Chambers, what is meant by a station, what kind of station it is to be, upon what architectural specification it is to be constructed, with what materials and under what regulations; all of which things I have no means at present of ascertaining, and which, if

they could be ascertained at all, could only be ascertained after long delay, at considerable expense, and with a most uncertain result at the end of it. The plaintiff, unfortunately, has entered into an argeement so vague in its terms that I cannot direct the present specific performance of it. It is only that a station shall be made on three parcels of land which are mentioned in the schedule, or some parts thereof, upon what part of the land it was to be made, being left wholly undetermined and vague. If I were to direct specific performance I could only do it in the terms of the stipulation in the agreement, and the enforcing of those stipulations would be a matter that I should find great difficulty in, and which I could never dispose of satisfactorily to myself, nor, as I believe, to the advantage of the plaintiff."

And, on appeal, Lord Chancellor *Selborne* said:

"The principle which is material to be considered in the present case is, that the Court gives specific performance instead of damages, only when it can by that means do more perfect and complete justice. An agreement, which is not so specific in its terms or in its nature as to make it certain that better justice will be done by attempting specifically to perform it than by leaving the parties to their remedy in damages, is not one which the Court will specifically perform. Now, in this particular case, the only words expressing with certainty anything with which we have to deal, are the words of the engagement adopted by the company, that they will 'at their own cost, in a good, substantial, and workmanlike manner, erect, set up, and construct a station to be made on Nos. 24, 25 and 26, in the Parish of Wappenham, or some part or parts thereof.' If it had been the intention of the parties to exclude any contract as to the use of the station when erected, they could hardly have adopted better words for that purpose; for every word expressing what they are to do is applicable to the making of the station, and not to the using

of it. It is suggested that an agreement to use the station must be implied, for that it could only have been intended to be erected with a view to use. That the company were expected to use it is very probable, but it is not so expressed; and the Court, if it attempted to impose on the company anything like a definite obligation as to the use of the station, would not be executing the written agreement, but enlarging it. If the use can only be collected by implication, then in that respect the agreement is vague and indefinite. It is definite and not vague only as to erecting, setting up, and constructing something capable of being erected, set up, and constructed; but there is no other definition of what that thing is than that which is involved in the necessary meaning of the words a 'station.' I apprehend that that expression is definite to this extent—it means a stopping place on the line of railway, that is, a place at which traffic of some description may in a reasonable manner be taken up and set down by and from the carriages moving upon the line. To that extent it is definite and not vague, but the moment you suggest any considerations as to the nature and degree of the convenience and accommodation intended by the parties, then it is wholly vague and indefinite, and there are no elements which can enable the Court, adhering simply to the agreement, and not going beyond it, to determine how those uncertainties are to be reduced to certainties.

The Vice-Chancellor has thought that, under these circumstances, although the case is, in one sense, a strong one, being a case in which the company say distinctly, "We admit ourselves to be bound by this agreement, but we refuse to perform it," still it is a case in which the Court cannot satisfactorily do justice by means of a decree for specific performance, and the best justice of which the case is capable will be done by giving damages.

In *Brace vs. Wehnert* (25 Beav. 348), the Court was asked to enforce specific performance of a con-

tract to build, on a piece of ground specified in the contract, "a good and substantial messuage or dwelling house and necessary outbuildings of the value of one thousand four hundred pounds at the least, according to the said plan thereof to be submitted to and approved by Thomas Brace, &c." No plan was submitted or approved. The Court decided that the contract was not definite enough to be specifically enforced.

The Master of the Rolls (*Sir John Romilly*), giving the opinion, said:

"I think that the jurisdiction of this Court, in cases of specific performance, should not be diminished, and I concur in the cases which lay down, that if the thing contracted to be done can be made reasonably clear, the Court is bound to decree a specific performance. But I think not only that the cases, but the reasons for them, are too strong to warrant me in giving the plaintiff a decree for specific performance in this case.

"An agreement for building a house of a certain value is not one which this Court will direct to be specifically performed. The Court would have great difficulty in determining whether its decree had or had not been performed, and it might lead to much litigation. In this case they could come to no satisfactory conclusion whether the house when built, with the necessary outbuildings thereto, was or not of the value of £1,400 at the least. * * * But there is an additional difficulty; these buildings are to be 'according to plan to be submitted to and approved of by Mr. Brace,' and in order that there may be no mistake in the matter, the defendant afterwards repeats the words of the contract, and he covenants that this is what he is to do. It is clearly impossible for this Court to decree this to be specifically performed. How can I determine on the

plan? This contract is not only vague, but it raises difficulties, to be found in all cases where a specific performance is asked of something which the Court has no means of enforcing, such as to make repairs, write a book, or exercise a discretion which the Court cannot exercise. I could never compel Mr. Brace to approve a particular plan if submitted to him by the defendant. If I were to say he was bound to approve of any plan which is reasonable (and which I think I could not do), how could I determine upon its reasonableness? The evidence would be of the vaguest possible description. I might approve of a handsome plan, and afterwards find that the expense of building the house would be beyond £1,400. The cases where the plans are already prepared differ from the present. Here the parties must rely on the honor of each other for the performance of the contract, and in case of non-performance on their remedy by way of action at law for damages."

To the same effect are

Wilkes vs. Davis 3d Merivale, 506.
Blundell vs. Brettargh, 17 Ves. 231.
South Wales Ry. Co. vs. Wythes, 5th De G. M. & G. 880.
Fry on Specific Performances, Secs 164-203.

Again, *the fact must be kept in mind that Joy and his associates took the property as purchasers; that they have made no covenants; that they are assignees of the Kansas City Company.* and that courts of equity require contracts (where they are such as can be enforced against assignees) to be much more definite and certain in their terms when their enforcement is sought against assignees, than when the proceedings are against original parties.

In *Kendall vs. Almy* (2d Sumner, 278), *Mr. Justice Story* said:

"There is no just ground to call upon a court of equity to enforce a specific performance of a contract between the original parties themselves when its terms are not clear, definite and positive. *A fortiori*, there is still more difficulty in enforcing it against an assignee."

In *Montgomery et al. vs. Norris et al.* (2d Howard Miss. 499), *Chief Justice Sharkey* said:

"Courts of equity will not enforce contracts unless they are certain in terms, and this rule applies with additional force as between the representatives of the contracting parties."

To *the same effect Odell vs. Morin*, (6th Oregon, 96.)

IV.

The Court erred in entering a decree compelling the specific performance, by the Wabash Company, of a continuous duty requiring the exercise of skill and personal judgment, as well as the constant expenditure of money, and requiring the Court to retain perpetual control over the cause in order to superintend the execution of the decree, and make, from time to time, such changes in the rules and regulations adopted as the circumstances of the parties and the shifting contingencies of business and trade shall render necessary.

The question of whether a court of equity will specifically enforce a contract which requires the

performance of continuous duties, and the constant supervision, by the Court, of a business involving skill, personal labor, cultivated judgment and the constant expenditure of money, and where, if performance is decreed, the case must remain indefinitely in court, has been so recently and so fully considered here, that to determine this case it seems only necessary to examine the decree and see whether it falls within the rule announced.

An examination of the decree entered shows it to be as follows:

First. It fixes the compensation to be perpetually paid by the Colorado Company for the use of the right of way, tracks, side-tracks, switches, turnouts, turn-tables and other terminal facilities between the north line of the park and the Union Depot, at two thousand five hundred dollars per month, and requires that sum to be paid, monthly, by respondents to appellants, as long as the decree remains in force.

Second. It provides that the expenses of maintaining the property, during its joint use, shall be ascertained and borne by the two companies upon a wheelage basis, and it requires those accounts to be adjusted *annually*.

Third. It requires that the right of way, tracks and other terminal facilities, shall be maintained and kept perpetually *in good repair* by the Wabash Company.

Fourth. It provides that the running of trains by the Colorado Company over said tracks, and the use of said right of way and terminal facilities, shall conform to such rules and regulations of the Wabash Company as were in force at the date of the decree, *and to such other reasonable rules and regulations as may be adopted* by the Wabash Company, and it provides that the sole control and regulation of the running of the trains of said companies shall be in the Wabash Company, "*subject to the further orders of the Court.*"

Fifth. It decrees that subject to the foregoing terms the Colorado Company shall enjoy the equal use and benefit, with the Wabash Company, of said right of way, tracks, switches, side tracks, turnouts, turn-tables and other terminal facilities, and it enjoins the Wabash Company from refusing to permit the Colorado Company from using said property in the transaction of its business.

By reference to "Exhibit D" (page 102 of printed record) it will be seen that the decree adopted a code of *ninety-eight* printed rules to regulate the conduct of the parties in the use of the property. Those rules provide in the most minute detail for the operation of trains, and require *daily and hourly*, the performance of hundreds of affirmative acts by the servants of the Wabash Company. The decree also provides that *other reasonable rules and regulations* may be added to this code by the Wabash

Company, *subject to the further orders of the Court.*

Under this decree the case must remain forever in Court, and the Court to the end of time may be called upon to determine the innumerable controversies that may arise between the parties under its provisions. Under it, constant payments and settlements are to be made, some monthly, others annually, and hence it is a constant and perpetual duty of the Court to enforce those provisions. Under the decree it is made the duty of the Wabash Company to perpetually maintain the tracks and all said terminal facilities in *good repair*, and the question of what is *good repair* is an issue on which the parties are entitled to be heard, and may call for as many separate trials as there are complaints.

And furthermore, to keep the property in *good repair*, calls for the constant expenditure of money and the exercise of judgment and professional skill, and to perform that duty the Court must, if required, compel the Wabash Company, or its assigns, to raise money and afterwards expend it with judgment and skill necessary to keep the tracks, turntables and other terminals in *good repair*. A failure to comply with any one of the *ninety-eight* rules, or a dispute as to their meaning, furnishes a controversy that can only be determined by the Court that entered the decree. Not only that, but *new rules* may be made and the question of *whether they are reasonable*, is reserved to the Court, and on application of the parties, must be determined by

it. In short, the whole future management of the property is, by the decree, taken out of the hands of its owners and, for all time, subjected to the orders and control of the Court.

In *Texas Pacific Ry. Co. vs. Marshall* (136 U. S. 393), it was recently held that it was error for a court of equity to enter a decree which required it to be making constant inquiries as to whether its provisions were being obeyed perfectly and in good faith, or in an evasive manner, and that rendered the Court liable to be perpetually called upon to make the same inquiries in the future and thus assume endless duties which are inappropriate to the functions of a court of equity. And it was said that the task of supervising and enforcing a contract for the building of a house or a railroad, was outside the proper functions of a court of equity and not within the powers of a specific performance.

Marble Company vs. Ripley, 10th Wall. 339.
Port Clinton R. R. Co. vs. Cleveland & T. R.R.Co., 13th Ohio State, 544.
South Wales R'y Co. vs. Wythes, 5th De G. M. & G. 880.
Powel-Duffryn Steam Coal Co. vs. Taff, Vale R'y Co., L. R. 9th Ch. Ap 331.
Ross vs. Union P. R'y Co., 1st Wool, 26.
City of St. Thomas vs. Credit Valley R. R. Co., 7th Ont. Ch Div. 332.
Blanchard vs. Detroit L. & M. R. Co., 31 Mich. 43
Pollard vs. Clayton, 1st K. & J. 462.
Booth vs. Pollard, 4th Y. & C. 61.
Pomeroy on Contracts (Specific Performance), Secs 288, 307, 312.

Notwithstanding the cases have been so recently reviewed in this Court, we will, for its convenience,

make a few quotations from those on which we most rely:

In *Marble Co. vs. Ripley* (10th Wall. 339), this Court (p. 358) said:

"Another serious objection to a decree for a specific performance is found in the peculiar character of the contract itself, and in the duties which it requires of the owners of the quarries. These duties are continuous. They involve skill, personal labor and cultivated judgment. It is in effect, a personal contract to deliver marble of certain kinds, and in blocks of a kind, that the Court is incapable of determining whether they accord with the contract or not. The agreement being for a perpetual supply of marble, no decree the Court can make will end the controversy. If performance be decreed, the case must remain in the Court forever, and the Court to the end of time may be called upon to determine, not only whether the prescribed quantity of marble has been delivered, but whether every block was from the right place, whether it was sound, whether it was of suitable size or shape or proportion. * * It is manifest that the Court cannot superintend the execution of such a decree. It is quite impracticable. And it is certain that equity will not interfere to enforce part of a contract, unless that part is clearly severable from the remainder. Many of the difficulties in the way of decreeing specific performance of contract, requiring as this does, continuous personal action, and running through an indefinite period of time, are well stated in *The Port Clinton Railroad Company vs. The Cleveland and Toledo Railroad Company*, 13th Ohio St. 544."

In *Powell Duffryn Steam Coal Co. vs. Taff, Vale Ry. Co.* (supra), one company was, by an act of Parliment, authorized to use with its engines the tracks of another company, and a bill was filed to

compel the defendant to do the things necessary to enable the trains of the plaintiff to pass. In determining whether a court of equity ought to enter upon the business of superintending the use of a railroad by two companies, the Court said:

"It is impossible for them (the complainants) to exercise that right without danger, unless there is continuous use of the signals and of the points by the defendant's own people. Now it is, I think, impossible to say that a company ought to be compelled by this Court to trust its points and signals, upon which so much of the safety of mankind now depends, to any other persons than its own pointsmen and its own signal men. If therefore, relief is given to plaintiffs, it must in substance involve ordering the defendants to work the points and signals. But it is not the practice of this Court to compel by injunction, either a company or an individual to do a continuous act which requires the continuous employment of people. The Court will in a proper case restrain a man from singing at one theatre, but it will not undertake to compel him to sing at another; it may restrain a man from writing a book for one publisher, but it cannot compel him to write a book for another. Where what is required is not merely to restrain a party from doing an act of wrong, but to oblige him to do some continuous act involving labor and care, the Court has never found its way to do this by injunction."

In *Blanchard vs. Detroit, Lansing & Lake Mich. R. R. Co.* (*supra*), the bill was filed to enforce the specific performance of a contract made by defendant, to the effect that it would erect and maintain a depot on a certain piece of land suitable for the convenience of the public, and that at least one train a day each way should stop there, and that

freight and passengers should be regularly taken at such depot. The Court in that case reviews the authorities and states its conclusions as follows:

"Waiving all possible future action by the Government under the Postal, War, Police or other power inconsistent with any particular decree which might now be made, can the Court see that in all coming time these requirements are carried out? Can it know, or keep informed whether these trains are running, and what accommodations are suitable to the public interests? Can it see whether the proper stoppages are made each day? Can it take notice, or legitimately and truly ascertain from day to day what amounts to *regularity* in the receipt of and discharge of passengers and freight? Can it have the means of deciding at all times whether the due regularity is observed? Can it superintend and supervise the business and cause the requirements in question to be carried out? If it can, and if it may do this in regard to one station on the road, it may with equal propriety upon a like showing do the same in regard to all the stations on the road, and not only so, but in regard to all stations on all the present and future roads in the State. That any such jurisdiction is impracticable appears plain, and the fault lies in the circumstance that the objects of the parties, as they are written down by them, are by their very nature, insusceptible of execution by the Court."

The case of *City of St. Thomas vs. Credit Valley Ry. Co.* (*supra*), was an action brought to compel the specific performance of an agreement on the part of the railroad company, to build a line and run its trains to a certain station regularly for the purpose of checking baggage and the accommodation of passengers. After reviewing the English cases on the subject, the Court said:

"From the circumstances that appear, it is beyond doubt that in order to perform what is asked by the plaintiffs, either running arrangements will have to be obtained from the Canada Southern R. R. Co., or a new line of road built by the defendant for a considerable distance and at a very great expense indeed, and would involve the crossing of two other roadways. It would also involve the keeping of servants and the doing of continuous daily acts, such as the providing and selling of tickets, providing checks for baggage, and the doing continuously of all those things that are usually done at a railway passenger station. The case of *Powell Duffryn Steam Coal Co. vs. Taff, Vale R. Co.* (L. R. 9th Ch. Ap. 331), seems to show that in such a case the Court should not interfere by injunction. That was a case under the railway clause act of 1845, and *Lord Justice James* (p. 335) says: 'Where what is required is not merely to restrain a party from doing an act of wrong, but to oblige him to do some continuous act involving labor and care, the Court has never found its way to do this by injunction.' It appears to me that the case of *Blockett vs. Bates* (1st Ch. 117), and many other cases of the same character, are against the plaintiff's contentions."

In *Port Clinton R. R. Co. vs. Cleveland & Toledo R. R. Co.* (13th Ohio State, 544), which has been twice cited and approved in this Court, it was (p. 556) said:

"Even if the contract were sufficiently specific, so that the party, when ordered to operate the railroad, would know the manner and mode in which the order was to be obeyed, still the question of obedience to the order must necessarily be left open. And the question of obedience to such an order might come up for solution, not once, as in the case of the archway, the erection of which was ordered in *Storer vs. Great Western Railway* (2 Y.

& C. 48), but in instances innumerable and for an indefinite time Instead of the final order being the end of the litigation, it would be its fruitful and continuous source, and that, too, of litigation not in the regular course of judicial proceedings, but irregularly, on a summary application. And such application to be made by either party, one when he conceived there had not been a faithful compliance with the order, and the other when exemption from some provison might be claimed on the ground of inability or unforeseen events. For though the law might give damages for the breach of the contract, a court of equity will not enforce it if from circumstances such enforcement becomes unreasonably harsh and oppressive and without any corresponding advantage to the party seeking performance. And if a Court should undertake to enforce a contract requiring continuous personal action and running through an indefinite period of time, it must necessarily reserve the power to relieve against any unjust, harsh or oppressive operation of its order, shown by circumstances unforseen and occurring, it may be, years after the order was made."

In *Ross vs. Union Pacific Railway Company* (1 Woolw. 26), which was a suit for specific performance of a contract to construct a railroad, Mr. Justice *Miller* said (p 43):

"It seems to me, that to establish the general doctrine that contracts for building may be specifically enforced in equity, would be to invite into litigation, very many matters which are now generally settled by the parties on a basis much more beneficial to both; and that it would require the constant supervision of the Court, through its officers, in the conduct of affairs it is very poorly adapted to administer. The result of the Court's drawing to itself such a jurisdiction would certainly be far less remedial than the ordinary action for damages.

"There is another consideration to be noted in this connection. If the act be done by the delinquent party, whether the plaintiff or the defendant here, were a single act, to compel which a single decree of the Court would be sufficient, a case would be presented very unlike that before us. Years must elapse before this work can be done and paid for. At every step in its progress, the interposition of the Court, either by orders in this case, or by decrees in successive cases, may be invoked, if we are at this time to lend the aid of chancery to either of the parties. It is not difficult to foresee the mischiefs of such a course. The rule is settled, even in the English Chancery, where the jurisdiction is greatly extended in all such cases, that it will decree specific performance only when it can dispose of the matter by an order capable of being enforced at once; that it will not decree a party to perform a continuous duty extending over a number of years, but it will leave the opposite party to his remedy at law. * * * It will be observed that the infirmity of uncertain and vague stipulations is common to that and this contract, for this line of road remains unlocated, and, according to the usual course of such enterprises, must be subject to changes not possible now to foresee; and in this way differences irreconcilable between the parties, and which this Court cannot determine may, and almost certainly will arise. So, too, as to the performance of the work, the same difficulties are very likely to occur."

The general doctrine on this point is stated by *Mr. Pomeroy* (Specific Performance) as follows:

"Sec. 288. * * * Finally, although the contract may be valid, and in its nature capable of being performed, and the defendant competent to perform, the Court may be unable, by its ordinary administrative instruments and with any reasonable exercise of its judicial and executive functions, to enforce and carry into effect the decree which it

might render. Although the rendering a decree ordering such and such acts to be done may be easy, still, if the Court has no means and instruments for making its decisions effective, and compelling obedience to its mandates, its decree would be nugatory, and will not be granted."

Again, in section 307, II, in speaking of the specific performance of contracts having such terms that a Court is unable to carry into effect its decree without continuous or protracted supervision, he says:

"In this class of agreements, which is by far the most numerous and important, the jurisdiction is declined, not because it is impossible to formulate a decree which shall order everything necessary for a complete performance, nor even because a compulsory execution of such decree is absolutely, and, in the nature of things, impossible, but because the enforcement of the decree would unreasonably tax the time, attention and resources of the Court, and thereby interfere too much with its public duties towards other suitors, and in the general administration of justice. Take the case, which is the extreme one, of a contract for the construction of an extensive line of railway. It is plain that a court of equity can render and put into a proper form a decree ordering the specific execution of this contract, with about the same ease that it can make a decree ordering the execution and delivery of a deed of conveyance with the requisite covenants and other provisions. It is also plain, that by means of a comprehensive and minute scheme of operations, prepared by experts, and by the help of special masters overseeing the work and reporting its progress from time to time, the Court might enforce this decree, although months, or even years, should be required for its completion; but to do so would occupy the care, attention and time of the Court, to the exclusion of other matters, and to the manifest detriment of the

public business. A judicial tribunal cannot thus sacrifice the interests of other suitors, and even of society, for any benefit which might accrue to individual parties. For this reason, rather than from any inherent and absolute impossibillty, equity refuses to exercise its jurisdiction under such circumstances."

And still again (Sec. 312) he says:

"Finally, contracts which by their terms stipulate for a succession of acts, whose performance cannot be consummated by one transaction, but will be continuous, and require protracted supervision and direction, with the exercise of special knowledge, skill or judgment in such oversight—such as agreements to repair or to build to construct works, to build or carry on railways, mines, quarries, and other analogous undertakings—are not, as a general rule, specifically enforced."

V.

The Court erred in entering a decree broader than the contract.

Even if the *ninth* clause of the tripartite agreement was binding on the Kansas City Company, it only required it to permit other railroads to use *its* "*right of way*," and yet a decree was entered giving respondent the use of "the right of way, tracks, switches, turnouts, turn-tables and other terminal facilities of the Wabash Company" at St. Louis.

Again, the decree is not only broader than the contract, *but it is broader than the prayer of the petition.* The prayer of the petition is, that the

Colorado Company be permitted to use the right of way of the Wabash Company, "commencing at the north line of said park, thence over *said right of way* to Eighteenth street in said City of St. Louis, by running its engines and cars over and upon said right of way, *including the tracks* of said Wabash Company between said points."

The contract only related to "right of way;" the prayer of the petition was for the use of "right of way and tracks," and the decree not only gives them the use of the "right of way and tracks," but it subjects to the use of respondent the "switches, side-tracks, turnouts, turn-tables and other terminal facilities," and even goes so far as to require the Wabash Company to keep those additional properties in repair for respondent's use.

Therefore, no matter what view may be taken of the case in other respects, the decree was erroneous in two particulars: *First*, because it is broader than the covenant; and, *Second*, because it is broader than the prayer of the bill. Both these objections are elementary.

VI.

The Court erred in holding that mutuality of equitable remedy existed between the parties to this suit.

The question of whether there is mutuality of equitable remedy between appellants and the Colorado Company, is a matter that can only be de-

termined by reference to the nature of the contract, the words employed and the relation of the parties to each other. Of course these parties have no contract relations. The Colorado Company has no contract relations with anyone, and it is not pretended that Joy and his associates have entered into any covenants. The agreement on the part of the County Company was, that it would, at some future time, *make contracts* permitting other railroads to use its right of way on such terms *as might be agreed upon between it and the companies desiring to enter upon the use of its right of way.*

If a contract had, on a given date, actually been entered into between appellants and the Colorado Company, the contract so made would have created mutuality between the parties to it, and it would have put the Colorado Company in such privity with the Wabash Company as would now enable the Wabash Company to enforce such agreement against the Colorado Company. But as matters stand there is no sort of mutuality of contract, or of legal or equitable obligation between the Colorado Company and the owners of the railroad. Appellants may, under the decree, spend vast sums of money in providing tracks and terminal facilities sufficient for the accommodation of the Colorado Company, and then the Colorado Company may withdraw from the use of the property whenever it suits its convenience.

As the Colorado Company has no contract relations with anyone, it is neither in the power of the

Court, nor of the appellants, to compel it by any known process to remain one day longer than suits its purposes. The *ninth* clause of the tripartite agreement never contemplated any such state of affairs as now exists; *it contemplated a contract between the company owning the property and the company entering upon its use*, and until such contract is made, no mutuality of equitable remedy can possibly exist.

It is an evasion of the real question to say that what was done by the Park Commissioners in the way of erecting walls and arches in the park, *was an execution* of an agreement which was to admit the Colorado Company into the use of the property in question.

If this action had been brought to enforce specific performance of a covenant with the Park Commissioners, with respect to the grade of the railroad in the park, or to compel performance of some other duty which, under the agreement, the railroad company owed the Park Commissioners, the proposition would be entirely different, and the doing of the work by the Park Commissioners which, by the contract, they were to do, might be urged as a ground for requiring a specific performance of the covenants of the railroad company with respect to the manner of constructing the road in the park. But as the Colorado Company was only to be admitted under such agreement as might be thereafter made between it and the owners of the railroad, and as no such agreement has been entered

into, there now exists neither privity of contract nor mutuality of equitable remedy, and unless mutuality of equitable remedy does exist between the parties, no specific performance can be decreed.

Pomeroy on Contracts (Specific Performance), Sec. 162 *et seq.*

The contract that was made between the Park Commissioners and the railroad companies, and under which certain work was done in the park, was one thing, and the contract *to be made between the company owning the railroad and the company desiring to use it*, was quite another.

By its decree, the Court has clearly attempted to enforce the contract *to be made*, or in other words, it has put into its decree such provisions as, in its opinion, the parties *ought to have* put into an agreement of their own making.

VII.

The Court erred in holding that the contract of the County Company to permit other railroads to use its right of way, was binding on Joy and his associates, they being purchasers, in good faith and without notice, under the mortgage made by the Wabash Company in 1880.

The Record shows the following facts:

First, It shows (p. 269) that long before Joy and his associates bought, the deed from Griswold to

the County Company had been acknowledged and duly recorded.

Second. The Park Act was a public statute, and the fact that it gave the County Company an unincumbered and undisputed right of way through the park, was notice to everyone.

Third. The Record shows (p. 253) that in 1875 the County Company conveyed an undivided half of all its right of way through the park (as well as a portion of the lots it owned outside the park), to the Kansas City Company, for the sum of $125,000, and that the deed of the County Company was, in said year, duly acknowledged and recorded.

Fourth. The Record shows (p. 238) that the contract of August 11th, 1875, between the County Company and Kansas City Company *was never acknowledged or recorded;* and

Fifth. The Record shows (p. 243) that the tripartite agreement, the agreement through which the Colorado Company now makes its claim, *was never acknowledged as a deed.*

If the tripartite agreement was never acknowledged as a deed, then the filing of it in the office of the Recorder, imparted no notice to Joy and his associates.

That point was expressly ruled in *Bishop vs. Schneider*, 46 Mo. 472.

But to avoid the effect of the rule laid down in Bishop vs. Schneider, the Court found that the

recitation in the deed of August 11th, 1875, from the County Company to the Kansas City Company (which deed was duly recorded) to the effect "*that the County Company executed that deed in pursuance of the terms of a certain contract made between the same parties on the 11th day of August, 1875, and in full satisfaction of so much of said contract as related to the conveyance of certain pieces of land and rights of way to said party of the second part*," was sufficient to put subsequent purchasers on inquiry as to the contents of the previous unrecorded contract between the two companies; and that having found and examined the contract between the two companies, a purchaser would discover in it, a reference to the unacknowledged and improperly recorded tripartite agreement, and that upon reading the tripartite agreement he would find the clause on which the Colorado Company bases its claim.

Now, we contend that the above finding was erroneous, and we say in the first place, that a statement in a general warranty deed to the effect, "that it is made in pursuance of a previous personal contract between the parties and in full satisfaction of so much thereof as relates to the conveyance of the property," is not, and in reason cannot be, sufficient to put a subsequent grantee on inquiry for prior incumbrances. There is nothing in the language used which even suggests the possibility of any previous incumbrances, or the previous granting of an easement in the property conveyed to anyone.

Again, we say, that when the document referred to is not a deed, but a mere collateral personal agreement, a reference to it in a deed, in which the grantor covenants that he is seized of an indefeasible estate in fee simple, does not even put a subsequent purchaser on inquiry. Of course we understand that when a party is put on inquiry concerning matters affecting his title, he must pursue them, but a personal contract does not affect title, and we find no case in which it has been held, that a reference in a deed *to one personal contract*, and a reference in that personal contract, *to a second personal contract*, was sufficient to charge a subsequent purchaser with notice of anything contained in the second personal contract.

But, again, the Court found, that the further statement in the deed from the County Company to the Kansas City Company, to the effect "*that the County Company conveyed said rights of way, subject to the terms and conditions upon which the same were granted to the County Company*," was sufficient to put subsequent purchaser on inquiry as to such conditions. We grant that proposition, but let us inquire what property the County Company was conveying to the Kansas City Company "subject to the terms and conditions upon which it had been conveyed to the County Company." The answer is, that the County Company was, in that deed, conveying to the Kansas City Company an undivided half of its right of way through the park, and a strip twenty-eight feet in width through

such lots as the County Company owned between the park and the city.

Now as to the lots *outside the park*, there is nothing in all the record tending to show on what conditions one foot of that ground had been conveyed to the County Company. And as to the right of way *through the park*, the County Company held that property under its deed from Griswold, as well as under the Third Section ot the Park Act, and there is nothing in either the deed, or act, showing, or tending to show, that the County Company held its right of way through the park subject to any conditions whatever. The County Company claimed nothing in the park through any grant from the Park Commissioners, and the Park Commissioners never attempted to grant anything to that company.

The title to the lands in the park was *vested in the people* of the county, and the Legislature had absolute control over it for all purposes.

> *State ex rel. etc. vs. St. Louis Co. Ct*, 34 Mo. 546.
> *Barnes vs. Dist. of Columbia*, 91 U. S. 540.

It is clear that the proviso in the third section of the Park Act was intended *as a grant.* When the Legislature said that nothing in the act contained should "prevent the County Company from using a right of way through the park not exceeding seventy feet in width," it was precisely the same as saying that the County Company might have, and use, a right of way, not more than seventy feet in width, through the park.

And the fact that the road was not constructed through the park precisely on the right of way granted by Griswold, is not material. Joy and his associates were not required to survey the line to see whether it was located exactly on the strip described in the Griswold deed. If a party grants a given strip to a railroad company, as a right of way through his land, and afterwards stands by and sees the road constructed on a different line, both he and his assigns are estopped from afterwards complaining, and in so far as mortgagees and purchasers are concerned, it is the same as though the road was actually on the line described in the deed. Hence it was error for the Court to find that anything contained in the deed from the County Company to the Kansas City Company was sufficient to put Joy and his associates on inquiry as to incumbrances, or as to anything contained in the tripartite agreement.

And again, it must be remembered that the Kansas City Company only obtained a fractional part of its right of way *between the city and the park* from the County Company. What it obtained in that manner is plainly indicated on "Chart A," found at the back of printed record. Now, as to the property *outside the park*—that which was acquired from other parties *by deed or by condemnation*—there was certainly nothing in the deed from the County Company to put Joy and his associates on inquiry concerning incumbrances on those portions of the line. The deed of the County Company

forms no link in the chain of title through which Joy and his associates held, by far the major portion of the line between the park and the city, and we understand that purchasers are only bound to take notice of recitals contained in the deeds which form *links in their chain of title*. They are not bound to inquire into collateral contracts and circumstances.

Acer vs. Westcott, 46 N. Y. 384.
Burch vs. Carter, 44 Ala. 115.
Attorney General vs. Backhouse, 17 Ves. 282.
Mueller vs. Engeln, 12 W. D. Bush. 441.
Penrose vs. Griffith, 4 Binney, 231.

And, certainly, the recitals in the contracts or even in the deed from the County Company to the Kansas City Company, were no sort of notice to purchasers of any incumbrances upon, or easements *in all that portion of the right of way outside the park not conveyed by the County Company to the Kansas City Company*. As to the property *not purchased from the County Company*, the recitals in its deed to the Kansas City Company *lay outside the chain through which Joy and his associates derive title to all that portion of the property which never belonged to the County Company*. Therefore, as to all the property *not purchased from the County Company*, the record shows no fact sufficient to put a purchaser on inquiry for incumbrances of any sort. This point was expressly ruled in *Tydings vs. Pitcher*, 82 Mo. 379.

For the errors assigned, the decree ought to be reversed, with costs.

WELLS H. BLODGETT,
Solicitor for Appellants.

APPENDIX.

THE PARK ACT.

"An act to establish 'Forest Park,' in the County of St. Louis, to provide for the establishment and government thereof, and to provide for the issue of bonds by the County Court of St. Louis County for the purposes of said park, and for the purchase and condemnation of lands for the same.

Section.
1. Forest Park established; its boundaries.
2. Manner of condemning property for park purposes.
3. Circuit Court to put County Court in possession of property, when.
4. Issue of bonds.
5. County tax, increase of.
6. County Treasurer to be ex-officio Park Treasurer.
7. Commissioners, their appointment.
8. County Court to carry act into effect at once.
9. Claims to be audited and and paid by the County Court.
10. Circuit Court to approve purchase made by the County Court, when.
11. Act to take effect, when.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. A public park is hereby established for the people of the County of St. Louis, to be called Forest Park, and described as follows, viz: Commencing at a point in the western line of the King's highway, where the continuation of the northern line of Lindell avenue intersects the same, and running thence north eighty-three degrees; west on a line parallel to the northern line of the lands of the late Robert Forsythe, to the Skinker road; thence southwardly along the eastern line of Skinker road to the northern line of lot number four (4) of the subdivision of the Gratiot League square, being the southern line of land belonging to Charles

P. Chouteau and Julia Maffit; thence eastwardly along the last mentioned line to the King's highway; thence northwardly along the western line of the King's highway to DeMun avenue; thence westwardly along the southern line of DeMun avenue to the western line of Barnes avenue; thence northwardly along Barnes avenue and the King's highway to the place of beginning; and the County Court of St. Louis County is hereby authorized to purchase or condemn all the lands embraced within said boundaries, for the purposes of said public park: *Provided*, that before any purchase by the County Court of said property for said park, an appraisement of said property shall be made by three appraisers, in the manner described in section two of this act, and said County Court shall not pay a larger sum for said property than the amount of said appraisement.

SEC. 2. The County Court, by its presiding judge, shall file in the Circuit Court of said county a petition setting forth the property, or any interest therein, sought to be condemned, the names of the owners thereof, and any matter deemed advisable or required by the Circuit Court. The husband of any married woman and the guardian of any infant who is an owner, or the trustee of any person or persons interested, shall be made party to the proceedings, and all other persons interested, so far as known. The Circuit Court shall thereupon issue a notice to such owners and other persons interested, by the filing of the petition, and fix a day for the hearing of the same. Such notice shall be served on the owner and said other persons in person, if found, and if not found, by leaving it with a member of his family, over fifteen years of age, and at least fifteen days before its trial. If such owner or other persons be either a non-resident or absent from the State, it shall be published for thirty days in two newspapers published in the County of St. Louis, with a brief statement of the nature of the case, and such other facts as the Court may order,

and thereupon the Court shall hear and determine the cause as speedily as possible. If the defendants be found to be the owners of or otherwise interested in the property, the Court shall, unless the parties themselves agree upon appraisers, within twenty days, appoint three disinterested men to view and appraise the property sought to be condemned; or if either party requires it, a special jury of six shall be summoned to fix the value of the same. If any appraiser or appraisers refuse or fail to attend or act, the Court may appoint another. The appraisers (or jury) shall hear testimony under oath, and return their report into Court within ten days after they are qualified to act. Their report shall be under oath, and the concurrence of a majority of them fixing the value of the property, shall be sufficient. It shall state the value in cash, of the property, or of the interest or estate therein sought to be condemned, and any other fact the Court may require. Either party may except to the report, in writing, filed in the Circuit Court within ten days after it is filed, and not thereafter. All such exceptions shall be determined by the Court in a summary manner. If there be no exceptions, or the same be overruled, the Court shall confirm the report, and give judgment accordingly. Each of said appraisers, or of said jury, shall have been a resident of said county for the five years next before his appointment, and an owner in fee of real estate in said county, and not interested in any of the lands of the park, or adjoining thereto: *Provided*, in all cases the assessment of the County Assessor for the year 1873 shall be taken as a guide in fixing the value of property to be condemned or appraised.

SEC. 3. Whenever the said County Court shall pay the amount so found to the party entitled to it, or pay it into the Circuit Court, said Circuit Court shall immediately order and decree that the title in fee to the property and every other interest therein be divested out of such owner and other persons interested, and vest forever in the people of said

county; and said Circuit Court shall thereupon immediately put the said County Court into the possession thereof. No subsequent legal proceedings shall affect the possession or title so held by the county and the people; and if there be any error in the proceedings, there shall only be a new appraisement or proceedings to condemn, and the value fixed in such new proceedings shall be as of the date of the old proceedings; and no improvements on the property made in the meantime shall be considered. If the title to any such land be in litigation, the Court may make any order in the matter it sees fit and right, not inconsistent with this act. *Provided*, that nothing in this act contained shall prevent the St. Louis County Railroad Company from using and occupying a right of way of the width of not more than seventy feet through the northeastern portion of said Forest Park; the said railroad shall only enter the park through Duncan's subdivision on the east side of said park, and running westwardly on the northern side of the River des Peres, shall pass out of said park at a point on the northern line thereof, east of Union avenue: *and provided further*, that no switch or siding shall be constructed by said railroad company in said park, nor shall more than one depot be established in said park, and that shall be for passengers only: *and provided further*, that the grade of said railroad, as far as the same runs through said Forest Park, shall be approved by said Park Commissioners.

SEC. 4. Said County Court is hereby authorized to issue the bonds of said county, to an amount not to exceed the sum of thirteen hundred thousand dollars, payable thirty years after date, with interest coupons attached, at the rate of six per cent. per annum, payable semi-annually, either in the City of New York or the City of St. Louis, and to apply the same, as far as may be, to the purchase of any of the land included in said Forest Park, or said County Court may sell said bonds to such an

amount as may be required to pay for the said property, or any portion thereof, so to be purchased or condemned; and the balance (if any) shall be applied to the improvement of said park.

SEC. 5. The said County Court is hereby directed to increase the per centum of the county taxes one-half mill on the dollar, and any money collected by the county, by the increase of tax under this act, and in excess of interest paid on said bonds, shall be placed in the county treasury as a fund for the payment of the bonds authorized by this act and for the improvement of the park.

SEC. 6. The County Treasurer shall be custodian of all moneys arising from the sale of said bonds or from said tax, until the same shall be disbursed as herein provided.

SEC. 7. Commissioners shall be appointed as follows:

Three to be appointed by the County Court of St. Louis County, and confirmed by the Circuit Court in general term, and three to be appointed by the Mayor of the City of St. Louis, and confirmed by the City Council of said city. The Commissioners appointed as herein provided shall constitute the Board of Forest Park Commissioners. The Presiding Justice of the St. Louis County Court shall be, *ex-officio*, a member of said Board. Said Board shall have power to lay off, improve, adorn and generally govern, manage and control the use of said park, and the avenues surrounding the same, and to this end shall appoint and dismiss all officers and agents, prescribe their powers and duties, make agreements, rules and regulations therefor; and shall keep a record of their proceedings as such Board, and report all their proceedings to the County Court at the first meetings of said Court in January and July of each year. No such Commissioners shall receive any compensation for their services, or be in any manner interested in any contract concerning said park; said Commis-

sioners shall serve for six years, except the first Board, who shall cast lots to determine the length of their respective terms, one retiring therefrom at the end of each year, and his successor for a term of six years shall be appointed in the same manner as the original appointment was made; and all vacancies occurring in said Board by death, resignation or otherwise, shall be filled in the same manner; said Board shall disburse all moneys for the improvement of said park by drafts on the County Treasurer, made by their Secretary, countersigned by their President and approved by said County Court.

SEC. 8. The said County Court is hereby required to proceed with the purchase or condemnation of all the lands embraced within said Forest Park, without delay, and to carry out all the provisions of this act.

SEC. 9. Said County Court shall also hear and determine such claims and demands for expenses incurred, as the Commissioners appointed by an act entitled "An Act to establish Forest Park," approved March 25th, 1872, may present and audit, and pay so much of said claims and demands as it finds to be just and reasonable.

SEC. 10. All purchases so made by the County Court shall be approved by the Circuit Court of said county.

SEC. 11, This act shall (take) effect and be in force from and after its passage.

Approved March 25th, 1874.

Office Supreme Court U. S.
FILED,
NOV 24 1890
JAMES H. MCKENNEY

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 106.

JAMES F. JOY, THOMAS H. HUBBARD, EDGAR T. WELLES, AND O. D. ASHLEY, AS PURCHASING COMMITTEE; THE CENTRAL TRUST COMPANY OF NEW YORK AND JAMES CHENEY, TRUSTEES, AND THE WABASH ST. LOUIS AND PACIFIC RAILWAY COMPANY, APPELLANTS

vs.

THE CITY OF ST. LOUIS AND THE ST. LOUIS, KANSAS CITY AND COLORADO RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT AND BRIEF FOR RESPONDENTS.

LEVERETT BELL,
Solicitor for the City of St. Louis.
JOHN C. ORRICK,
Solicitor for the St. Louis, Kansas City & Colorado R. R. Co.
GEORGE P. PECK, *of Counsel*

LEVISON & BLYTHE STATIONERY CO., ST. LOUIS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1890.

JAMES F. JOY, ET AL.,
Appellants,

vs.

THE CITY OF ST. LOUIS AND ST. LOUIS, KANSAS CITY & COLORADO RAILROAD COMPANY,
Respondents.

No. 106.

STATEMENT.

For convenience we insert the statement of appellants, which is substantially correct, except that there is nothing in the Record to support Section 15, which is herein omitted.

The objects of the suit.

This action was brought by respondent to compel the specific performance of a contract, through which respondent (the Colorado Railroad Company) claimed itself entitled to a joint use, with appellants, of that portion of appellants' tracks which extend eastwardly from a point on the northern line of Forest Park, through the park, and from thence

to the Union Depot in the City of St. Louis at Eighteenth street. The facts out of which the controversy arose are, substantially, as follows:

The County Railroad Company organized

First. In August, 1871, a railway corporation known as the "St. Louis County Railroad Company" was organized under the General Laws of Missouri, to construct a narrow gauge railroad, from the City of St. Louis in a westerly direction to a point in the County of St. Louis 16 miles from the city. (Printed Record, p. 286.)

A right of way granted by Griswold.

Second. In November, 1871, W. D. Griswold was the owner of a tract of land lying immediately west of the City of St. Louis, known as the "Cabanne Dairy Farm," and on that date Griswold sold and conveyed to the St. Louis County Railroad Company a right of way forty feet in width, through the tract owned by him. (Printed Record, p. 268.)

The Act establishing park.

Third. In 1874 the Legislature of Missouri passed an act for the establishment of *Forest Park*, in the County of St. Louis, immediately west of the city. The act described the property which might be taken by condemnation for park purposes, and included the farm or tract owned by Griswold. The third section of the act contained the following proviso:

"*Provided*, That nothing in this act contained shall prevent the St. Louis County Railroad Company from using and occupying a right of way, of the width of not more than seventy feet through the

northeastern portion of said park; the said railroad shall only enter the park through Duncan subdivision on the east side of said park; and running westwardly on the northern side of the River Des Peres, shall pass out of said park at a point on the northern line thereof east of Union avenue; *and provided* further, that no switch or siding shall be constructed by said Railroad Company in said park, nor shall more than one depot be established in said park and that shall be for passengers only: *and provided* further, that the grade of said railroad, as far as the same runs through said Forest Park, shall be approved by said Park Commissioners." (Laws of Missouri, 1874, p. 371.)

Contract between County Co. and Kansas City Co.

Fourth. On August 11th, 1875, the St. Louis County Railroad Company (hereafter called "the County Company"), having located its line between the city and the park, and having acquired some detached portions of a right of way through a number of lots and blocks between the Union Depot and the park, and the St. Louis, Kanas City & Northern Railway Company (hereafter called "the Kansas City Company") already having a line of railroad from St. Louis to Kansas City, which connected on the northern line of the park with the right of way and line of the St. Louis County Company, the two companies on the 11th day of August, 1875, entered into a contract in which the County Company agreed to convey to the Kansas City Company, for the sum of one hundred and twenty-five thousand dollars, a strip twenty-eight feet wide through each tract owned by it, between the eastern line of the park and the western limits of the city, and a strip thirty feet in width

through each tract, lying between the western limits of the city and the Union Depot at Eighteenth street, and also an undivided one-half of all the right of way it then owned or might thereafter acquire through the park. The contract also provided, among other things, that inasmuch as the Kansas City Company was to make a tunnel and cut just east of the park, it should let the trains of the County Company pass through said tunnel and cut under such regulations and restrictions as were agreed upon, with respect to trains in the park and elsewhere. It was then provided, that the use of the property in the park and through the tunnel and cut should be in common, but that the Kansas City Company should have absolute control of the running and starting of its own trains and the making of its own time-tables, and that no train of the County Company, or its assigns, should be started within eight minutes of the time fixed for starting the trains of the Kansas City Company; that there should be twenty minutes' time between the starting and coming in of the trains of the County Company; that only the County Company should have a depot in the park and that the Kansas City Company should not have a depot or stop its trains in the park.

Contract between County Co. and Kansas City Co., continued.

The contract also provided that at two specified places within the city limits where the right of way of the County Company was narrowest, it (the County Company) might lay and use one rail on the right of way of the Kansas City Company; that where proceedings for condemnation, or nego-

tiations had been commenced by the County Company the same should be prosecuted, or discontinued, as requested by the President of the Kansas City Company. It also provided, that in consideration of the covenants therein contained, and of certain covenants and agreements on the part of the Commissioners of Forest Park contained in another agreement of even date therewith, the Kansas City Company should construct and maintain its railroad through the park, tunnel and cut, for the joint use of both said railroad companies; and said contract also provided that the County Railroad Company would within two years pay to the Kansas City Railway Company one-half the actual cost of constructing said road through said park, tunnel and cut, or forever relinquish to the Kansas City Company all claims to the road and property in said park, tunnel and cut. The contract was signed by said parties and delivered, but it was never acknowledged or recorded in the office of the County Recorder. (See printed Record, p. 233.)

Deed of County Co. to Kansas City Co.

Fifth. On the same day that the foregoing contract was made the County Company, in pursuance of its agreement as in said deed recited, conveyed to the Kansas City Company a strip twenty-eight feet in width through each lot or tract owned by it between the eastern line of the park and the western limits of the city; a strip thirty feet wide through each lot or tract owned by it, between the western limits of the city and Tayon

avenue in the City of St. Louis, and an undivided one-half of all its right, title and interest in or to the right of way and other privileges and franchises then owned or held by it, or which might thereafter be owned or held by it through said park.

The portions of the foregoing deed which are material to this controversy, are as follows:

"And also the said party of the first part (the County Railroad Company) hath conveyed, assigned and transferred, and by these presents doth convey, assign and transfer unto the said party of the second part (the Kansas City Company), * * * * the right of way over and upon the following described piece of land, situated between King's Highway and Union avenue, a strip of land twenty-eight feet in width off the southern portion and for the whole length thereof of that part of the right of way granted to said party of the first part by W. D. Griswold by deed dated Sept. 3, 1871, and recorded in the office of the Recorder of St. Louis County, aforesaid, in Book 443, page 96, lying between the northern line of Forest Park and the eastern line of Union avenue, all of which right of way conveyed by said deed is described as follows, to-wit: 'A strip of land forty (40) feet in width, the centre line of which begins at King's Highway, twenty (20) feet north of the southeast corner of the land of said Griswold, known as Cabanne Dairy Farm, and running thence westwardly along parallel to the other line thereof eight hundred and twenty-five (825) feet; thence by a curve eleven hundred and seventy (1170) feet long, bearing northwest with a radius of nineteen hundred and three (1903) feet, thence by a line bearing north fifty-five degrees, west about ten hundred and ninety (1090) feet to a point on Union avenue, not less than four hundred and eighty-seven (487) feet south of the northeast corner of Robert Forsythe's land. * * * * And also the said party of the first part hath conveyed,

assigned and transferred, and by these presents doth convey, assign and transfer unto said party of the second part and its successors and assigns an undivided one-half of all the right, title and interest of the party of the first part of, in or to the right of way, and of, in or to any and all other rights, privileges and franchises, powers and immunities, owned by or vested in, or enjoyed by the party of the first part, in, through or upon Forest Park by any means or from any source whatever; all of which conveyances of the said rights of way in this deed mentioned are made subject to the terms and conditions upon which the same are granted to the party of the first part."

The foregoing deed contained the ordinary covenants of warranty and was duly acknowledged and recorded in the office of the Recorder of said County, Aug. 13, 1875.

The several pieces of right of way owned by the County Company and conveyed by it to the Kansas City Company are indicated in blue on Chart "A," page 302 of Printed Record.

Tripartite agreement.

Sixth. On the same day (August 11, 1875) another agreement was entered into known as the "Tripartite Agreement," the parties to it being the Commissioners of Forest Park, party of the first part, the County Company, party of the second part, and the Kansas City Company, party of the third part. This tripartite agreement began by reciting:

"That said Forest Park Commissioners, in consideration of the relinquishments, agreements and stipulations hereinafter contained, on the part of said party of the second part, do hereby accept and approve the line and grade of said railroad as

laid down and described upon the accompanying plat and profile hereto attached and forming part of this agreement, and said line and grade in case there is no forfeiture of this agreement, is hereby fixed as the sole and finally established right of way to which said party of the second part is entitled by statute or otherwise through said park, or any part thereof, and the width of said right of way, as established by statute, is hereby reduced from seventy feet and fixed at fourty-two feet between its outer points."

The County Company then relinquished twenty-eight feet off the seventy feet of its right of way established by statute through the park, leaving its right of way through the park forty-two feet in width. The agreement then in eight successive paragraphs, provided for the manner of constructing the roadbed through the park by the County road; provided that it should not be so constructed as to mar the landscape beauty of the park; and for the building of a depot in the park just outside of the right of way but immediately adjoining it.

The eighth and ninth paragraphs read as follows:

Tripartite agreement, continued

Eighth. "The work of constructing said railroad through said park shall be commenced in good faith by the party, as hereinafter specified, within ninety (90) days from the delivery hereof and shall be completed in one year thereafter under penalty of a forfeiture of this agreement, and upon completion thereof the railroads shall be operated through said park so as to prevent unnecessary noise or inconvenience to the public as far as reasonably practicable, and the roads or their assigns shall comply with all reasonable rules or regulations of said Park Commissioners in that respect, and all of the aforesaid permanent improvements shall be

kept and maintained in such condition as will not injuriously affect or mar the landscape beauty of the park, this provision referring to the aforesaid forty-two (42) feet right of way road-bed; and said party of the second part, or its assigns, shall also keep its police or guard, within the limits of the Park, neatly uniformed."

Ninth. "Said party of the second part shall permit under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park and up to the terminus of its road in the City of St. Louis, upon such terms and for such fair and equitable compensation to be paid to it therefor as may be agreed upon by such companies."

The tenth paragraph is an admission by the County Road that its right of way is not exclusive, and that the agreement was not to be construed as limiting or impairing the right of the Park Commissioners to grant other rights of way to other railroad companies. The twelfth paragraph is as follows:

"And whereas, for the purpose of enabling the party of the third part to reach the Union Depot of St. Louis, Missouri, an amicable arrangement and agreement for a right of way outside of and through said Forest Park has been made and entered into by and between the parties of the second and third parts, and in pursuance thereof the parties of the second and third parts are to enter upon and enjoy the right of way and all the rights, privileges, immunities, powers, improvements, and property belonging to or vested in, or that may belong to or vest in the party of the second part, in common, in, upon and through said park, under certain regulations, terms and conditions agreed upon by and between said parties therein; and whereas the party

of the third part, in further pursuance of said last-named agreement, is about to construct, maintain and operate a railroad in, upon, and through said park, at great expense, and to engage in other great outlays and to assume other heavy burthens and responsibilities to be of advantage to said third party through the continued enjoyment of said right of way and other rights, privileges, powers, franchises, immunities, improvements, and property in, upon, and through said park: Now, therefore, in view of the premises and as inducements to said party of the third part to proceed as intended, the party of the first part does hereby grant and convey unto, and license and permit the said party of the third part, its successors and assigns, to have, hold, use and enjoy said right of way in, upon, and through said park, in common with and to be held and enjoyed jointly with said party of the second part and its assigns, on the terms of the said contract between them, and under the same terms and conditions as are hereby and hereinbefore imposed upon said party of the second part, and which are hereby assumed by said party of the third part, as to improvements, except as to building a depot and switch in said park, which the party of the second part is to do itself; or in case said party of the second part, its successors or assigns, should forfeit its said rights, privileges and franchises in, upon and through said park, or from any cause cease to have, maintain or enjoy the same, then it is hereby covenanted and agreed that the party of the third part shall not also be excluded from said park, but shall, with its successors and assigns, continue to have, maintain and enjoy all of said rights, privileges, immunities, franchises, improvements and property, on the terms hereinbefore set forth, continuously and forever."

Tripartite agreement, continued.

The thirteenth paragraph provides that the Kansas City Road shall have no depot in the park. The fourteenth paragraph, in so far as it is material, is as follows:

"Now, therefore, in consideration thereof and of the agreement of the party of the third part herein, the party of the first part herein accepts the agreement and contract of the party of the third part herein to execute, perform and comply with all of the terms, provisions and things herein mentioned to be done, performed, or complied with as to said improvements, except as aforesaid by the party of the second part hereto, so far as assumed as aforesaid, releasing it therefrom, and in consideration thereof the party of the third part hereto covenants and agrees with the other parties hereto that it will, in lieu and stead of the party of the second part hereto, do, perform, and comply with all the terms and provisions, matters and things herein expressed to be done, performed or complied with by said party of the second part as to said improvements, except as aforesaid, subject to the terms and conditions in said agreement of even date herewith contained; and it is hereby expressly covenanted and agreed that a compliance by the party of the third part, for itself or for itself and the party of the second part jointly, in the construction of said railroad in, upon and through said park, tunnel and cut in accordance with the terms of this agreement, shall be taken and accepted as a performance of the conditions imposed upon said party of the second part; and it is expressly covenanted and agreed that all and every part of the work, its kind, description and extent, to be performed by either of said parties of the second or third parts is hereinabove expressed, and neither of said parties shall be held or required to do or perform any other or further work and conditions than those hereby definitely set forth."

The last clause of the contract provided that neither of said railroad companies should be required to supply any material, or do any of the work necessary to construct or maintain either of the arched entrances into or exits from said park,

but that all the work and material required in the construction of said arches should be paid by the Park Commissioners.

The foregoing contract was signed by the parties, but it was never acknowledged as a deed. It was afterwards, in 1879, recorded in the office of the County Recorder.

Kansas City Co acquires additional right of way and constructs road through park and into City

Seventh. The evidence shows that after the execution of the foregoing deeds and contracts, the Kansas City Company acquired from divers parties the necessary additional right of way between the park and Union Depot, and proceeded to construct and put in operation its road through the park, tunnel and cut and on down to the Union Depot in the city; the road through the park being on the line established by the tripartite agreement. The evidence also shows that at the same time the Park Commissioners proceeded with the work referred to in the last clause of the preceding contract, and that they expended for material and work on the arched entrances or exits, rendered necessary by the presence of the railroad through the park, and in the erection of walls for the tunnel in the park, nearly forty thousand dollars. The evidence shows that the road through the park was completed in 1876 by the Kansas City Company, and that the County Company having failed in the performance of all its covenants, and having failed to refund to the Kansas City Company any portion of the cost of constructing the road through the park, it (the

County Co. abandons its rights in park.

County Company) lost and abandoned all claim to the right of way and road-bed through the park, tunnel and cut, and that the Kansas City Company thereupon under the terms of the agreement, took sole control of the road through the park, tunnel and cut. Afterwards in 1878, it acquired by purchase from third parties all the property and rights of way of the County Road between the park and the Union Depot.

Kansas City Co. consolidated with Wabash

Eighth. In 1879 the Kansas City Company was consolidated with the Wabash Railway Company and took the name of the "Wabash, St. Louis & Pacific Railway Company," and for convenience the consolidated company is hereafter called the "Wabash Company." The Wabash Company assumed all the obligations of the Kansas City Company, and in so far as this controversy is concerned the consolidation was only a change of name.

Wabash Co. makes mortgage to Central Trust Co. and Receivers are appointed

Ninth. In 1880 the Wabash Company conveyed its property in trust to the Central Trust Company of New York and James Cheney to secure a series of bonds, eighteen million dollars of which were issued and sold. In 1884 the Wabash Company became insolvent, and Solon Humphreys and Thomas E. Tutt were, by the Circuit Court of the United States for the Eastern District of Missouri, appointed receivers of its property, and afterwards bills were filed by the Central Trust Company and Cheney to foreclose said mortgage.

Colorado Co. demands use of line.

Tenth. In 1886 while Humphreys and Tutt, receivers, were in possession of the Wabash property, respondent (St. Louis, Kansas City & Colorado Railroad Company), having constructed a line of railroad connecting with the Wabash at north line of Forest Park and of the same gauge, demanded of the receivers, permission to run its cars over the Wabash tracks through the park and down to the Union Depot in the city, which Union Depot was in August 11, 1875, and has since continued to be the only general passenger depot reached by all railroads entering the city. Respondent contended that it was entitled to this right under the contracts aforesaid and particularly under the provisions of the ninth and subsequent clauses of the tripartite agreement. The claim made by respondents was denied by the receivers and thereupon the Colorado Company and the City of St. Louis filed their intervening petitions in the cause wherein the receivers had been appointed, setting forth the facts above stated, and praying the Court to enjoin and restrain the Wabash Company and the receivers from interfering with its use of said property. The City of St. Louis joined in the proceeding as the successor of the Park Commissioners, the park having by appropriate legislation been brought within the jurisdiction of the city. The prayer of the petition was as follows:

Bill filed.

Prayer of bill.

"Your orators pray that a writ of injunction issue out of and under the seal of this Honorable Court enjoining and restraining the said Wabash,

St. Louis & Pacific Railway Company, and said Solon Humphreys and Thomas E. Tutt as such receivers, and each of them and their agents, servants and counselors and employes from in any manner refusing to permit the St. Louis, Kansas City & Colorado Railroad Company, under such reasonable regulations and terms as to the Court might seem proper, from using the said right of way of said Wabash, St. Louis & Pacific Railway Company, commencing at the north line of said park, where the railway of said Wabash, St. Louis & Pacific Railway Company enters said park, thence over said right of way to said Eighteenth street (the Union Depot) in said City of St. Louis by running its engines and cars over and upon said right of way, including the tracks of said Wabash, St. Louis & Pacific Railway Company between the points at said Union avenue and said Eighteenth street." (Printed Record, p. 164.)

Answer.

In their answer the Wabash Company and receivers admitted the execution of the agreements, but denied that under them, or either of them respondent had any right to use any portion of the Wabash tracks or right of way through the park, or between the park and Eighteenth street. The answer then stated the facts concerning the execution of the general mortgage by the Wabash Railway Company in 1880 to the Central Trust Company and Cheney; averred that the Wabash Company had made default in the payment of interest on its bonds and that by the terms of said mortgage said trustees were entitled to possession of said property; that said Receivers were in possession of said railroad under said mortgage for the benefit of the holders of said mortgage bonds, and

that neither said bondholders, trustees nor receivers were privy to or bound by any agreement or contract made by the County Company with said Park Commissioners, with respect to the use of its railroad through said park or elsewhere, by other railroad companies. The answer then denied that petitioners were entitled to the relief prayed for, and set up the several defenses stated and relied upon by appellants in their brief and argument. (Printed Record, p. 170.)

Master's report

Eleventh. On the issues thus presented the case went to a Special Master, who reported in favor of the claim made by the petitioners. Considerable testimony was taken by the Master, but it related almost entirely to matters affecting the compensation to be paid by petitioners for the use of the tracks and property in question, and it is unnecessary to refer to that portion of it in detail. The following testimony of witnesses, on other points, was given:

Evidence.

S. T. Emerson, Chief Engineer in charge of the construction of the Kansas City Road from the Union Depot to the north line of the park, testified (page 84 of Printed Record) as follows:

Q. Now from that point (Forsythe Junction) to the Union Depot, what is the most, or the only practical entrance to the depot from that point? A. The Wabash Railroad.

Mr. Emerson also testified (page 72 of Record) as follows:

STATEMENT.

Q. How many tracks, if any, are on the right of way where the Wabash Railway now enters the park from Eighteenth street, the thirty feet from Eighteenth street to the park and the forty-two feet through the park? A. There are occasional places where there is a side track. There could not be but one track besides the main track on the thirty feet.

Andrew McKinley, President of the Board of Forest Park Commissioners at the time the tripartite agreement was made, testified (page 85 of Printed Record) as follows:

Q. What was the policy of the Board with reference to railroads passing through the park at the time of the execution of the tripartite agreement? A. There was a great deal of discussion and there was quite a controversy about where the road should run, under the provision which I have mentioned (referring to the act of Legislature, requiring the County Road to enter on the eastern side through Duncan's subdivision.)

Q. Please describe (page 86) the park to the Master, whether it has been improved, and if so, how, in a general way? A. The provisions contained in the proviso that I have just spoken of were intended to protect the park against the invasion of all railroads, unquestionably.

Q. What effect would the invasion of the park by railroads have upon the park for the purpose for which it was established? A. I think a very

damaging effect upon the point of use and upon the point of landscape.

Q. For what purpose was the park intended to be used principally—as a driving park? A. It is shown in the act itself to be dedicated to the people of the City and County of St. Louis for their enjoyment forever—that is, a pleasure ground for the people of St. Louis.

Q. Are there drives running through it? A. Yes, sir; nineteen and three-quarters miles of drives through the park.

Q. What effect would the penetration of the park by railroads at different points have upon the park as a driving park? A. Up to this time it Evidence. was apprehended that the road would produce some great danger to persons visiting Forest Park, and it was a long time before that public impression was relieved of the apprehension that horses would be frightened, and hence there is a provision that the road shall be covered over with a cover or protected by trees. During the time I was President of the park it was not thought to be necessary.

Q. How much money has been expended in beautifying the park? A. $405,000 during my administration; since that time nothing. It remains as it was then.

Q. What does it represent in money to-day? A. In cash paid $1,300,000 and besides that sum contributions made by the city since. The interest on that sum, of course, is to be added. The bonds are thirty-four year bonds.

STATEMENT.

CROSS-EXAMINATION.

Q. Now, the expenditures by the Park Commissioners were in the erection of masonry composing these two arches and the principal viaduct through which the people enter the park. It was in the masonry composing those structures? A. Yes, sir; there would have been no necessity for them, except for the railroad.

Q. They were made necessary to the railroad? A. Yes, sir.

Q. They were for the convenience of persons passing in and out of the park? A. Yes, sir.

Q. Without the railroads there would be no necessity for the culverts; they were the entrances for carriages and footmen? A. Yes, sir.

A. A. Talmage, General Manager of the Wabash Company, testified (p. 115 Printed Record) as follows:

Q. Would it be practicable for any other road subject to your rules and regulations to use the track from the north line of the park to the depot—I mean the main track? A. It could be done under the rules and regulations of this company, but usually it is done by substituting the motive power and trainmen of our own road to handle the trains of foreign roads.

Twelfth. Appellants excepted to the report and findings of the Master on various grounds, which need not be here given in detail. (For exceptions see Printed Record, p. 226.) Exceptions filed.

Thirteenth. The exceptions were argued before the Court and the Court held, that under the contracts, respondent (the St. Louis, Kansas City & Colorado Railroad Company) had the right to use on such terms and subject to such regulations as to the Court seemed equitable the Wabash tracks through the park, and from the park down to the connection with the Union Depot tracks at Eighteenth street in the city, and on those points it overruled all exceptions and confirmed the Master's report. The Court differed, however, with the Master on the question of compensation to be paid by petitioners, and sustained the exceptions of appellant on that point. (For opinion see Printed Record, 285.)

Exceptions overruled.

Fourteenth. The Court then entered a decree finding that the equities were with the intervenors and that they were entitled to the relief prayed for, and fixing the compensation to be paid by intervenor for the use of the right of way and tracks, side tracks, switches, turn-outs, turn-tables and other terminal facilities of the Wabash Railroad, between the north line of Forest Park and Eighteenth street in the City of St. Louis, at $2,500 per month.

Decree.

The decree then proceeds as follows:

"And the Court doth further find, adjudge, and decree that the expense per annum of maintaining the said right of way and other property perding such joint use thereof, including therein all taxes upon said property, shall be borne by the said Wabash, St. Louis & Pacific Railway Company

and the said intervenor, The St. Louis, Kansas City & Colorado Railroad Company, in proportion to the number of wheels each of said companies shall cause to be passed over the main track or parts thereof on said right of way per annum bears to the total number of wheels that both of said companies shall cause to be passed over the same during each year pending the said period of such joint use, and that this expense shall be paid at the expiration of each year. The said right of way and tracks thereon and other terminal facilities shall be maintained and kept in good repair by the Wabash, St. Louis & Pacific Railway Company.

"And the Court doth further order, adjudge and decree that the running of all trains, engines, or cars of said intervenor, the said St. Louis, Kansas City & Colorado Railroad Company, over said right of way and tracks, and the use of said right of way, road, terminal facilities, and other property specified as aforesaid, shall conform to the rules and regulations now in force, and such other reasonable rules and regulations as may hereafter be adopted by the said Wabash, St. Louis & Pacific Railway Company, or its said receivers, to enable said intervenor to fully enjoy the benefits of this decree, and that the trains of said railroad company, intervenor, shall be so regulated as that at least eight minutes shall, if deemed necessary, intervene between its trains and the trains of the said Wabash, St. Louis and Pacific Railway Company, at any point between said north line of Forest Park and Eighteenth street, and that the sole control and regulation of the running of the trains of the said companies shall be under this decree in the Wabash, St. Louis & Pacific Railway Company and its receivers, and subject to the further order of this Court.

"And the Court doth further order, adjudge and decree, that in all respects, subject to the terms of this decree, the said Railroad Company, intervenor, shall enjoy the equal use and benefit of said right of way, tracks, switches, sidetracks, turnouts, turntables, and other terminal facilities with said Wa-

Decree.

bash, St. Louis & Pacific Railway Company or its said receivers, and the said Wabash, St. Louis & Pacific Railway Company and Solon Humphreys and Thomas E. Tutt, as such receivers, and said Central Trust Company of New York and James Cheney and all persons claiming by, through or under them and each of them respectively and their agents, servants, counsellors, and employees be, and the same are hereby perpetually enjoined and restrained from in any manner refusing to permit the said intervenor, the said St. Louis, Kansas City & Colorado Railroad Company, its successors or assigns, and its or their officers, agents or employes from using with it or their engines, cars (loaded or empty), the said right of way, tracks, switches, side tracks, turnouts, turn-tables and other terminal facilities of said Wabash, St. Louis & Pacific Railway Company between the north line of said Forest Park and said Eighteenth street on the terms hereinabove set forth in this decree in and for the transacting of its or their business and in the operation of its or their road.

And the said intervenor, the St. Louis, Kansas City & Colorado Railroad Company, by its officers, agents and employes and each of them, is hereby authorized and permitted, with its right of way, road, tracks and property, engines and cars, loaded or empty, to make connection with said Wabash, St. Louis & Pacific Railway Company at the north line of said Forest Park and to use the said right of way, tracks, switches, side tracks, turnouts, turntables, and other terminal facilities of said Wabash, St. Louis & Pacific Railway Company or anyone claiming by, through or under it as to the same between the north line of said park and Eighteenth street on the terms, in the manner, and subject to the regulations in this decree set forth in and for the transaction of the business and in operation of the road of said St. Louis, Kansas City & Colorado Railroad Company, its successors or assigns, and said Solon Humphreys and Thomas E. Tutt, receivers, and all agents, servants or persons by them engaged or acting with or for them, said Central

Trust Company and James Cheney, said Wabash, St. Louis & Pacific Railway Company, and all persons claiming by, through or under said last named company, are hereby restrained and enjoined from in any wise obstructing, preventing, interfering with, or refusing to comply with the permit and privilege hereby ordered, adjudged and decreed."

Rules adopted

The rules in force upon the Wabash Road, and which were adopted by the decree, for the government of the parties in the use of the property, are found in "Exhibit D" on page 102 of printed Record.

Section Fifteen omitted.

Sixteenth. On the day the decree was entered, James F. Joy, Thomas H. Hubbard, Edgar T. Welles and O. D. Ashley filed their petition in the cause, reciting the execution of the Wabash mortgage of June 1, 1890, to the Central Trust Company and Cheney as trustees; stating that there had been a foreclosure of said mortgage and a sale of the mortgaged property on the 26th day of April, at which they had become the purchasers; stating that the sale to them had been duly confirmed by the Court and that proper deeds had been made conveying to them the right of way, railroad tracks, terminal facilities and other property, the use of which intervenor was seeking to acquire in this proceeding; that said property was still in the possession of and being operated by said receivers; stating that as such purchasers they had an interest in the property and subject matter of the litigation,

Joy and associates made parties.

which they desired to protect by an appeal to the Supreme Court of the United States and asking that they be made parties defendant, and that they be allowed an appeal to the Supreme Court of the United States. And the Court thereupon entered an order, on said day, reciting the petition, and that it appearing to the Court that said James F. Joy, Thomas H. Hubbard, Edgar T. Welles and O. D. Asnley were the owners of the premises and right of way theretofore owned by the Wabash, St. Louis & Pacific Railway Company, between the north line of Forest Park and across the park to Eighteenth street in the City of St. Louis, over which intervenor was seeking to obtain a right to run its engines and cars, it was therefore ordered that said purchasers be made parties defendant in said cause. (Printed Record, pp. 279–281.)

Appeal allowed

An appeal to this Court from the foregoing decree was afterwards allowed and duly perfected.

POINTS AND BRIEF.

First. Under the tripartite agreement, dated August 11th, 1875, between the Board of Forest Park Commissioners, the County Road and the Kansas City Road, and the deed of the County Road conveying half of its right of way through the park, etc., to the Kansas City Road, dated August 11th, 1875, duly recorded August 13th, 1875, the Wabash Company, as successor and grantee of the Kansas City Road, is bound to permit the Colorado Road to use its right of way for a fair and equitable compensation, from the north line of Forest Park, through the park to the terminus of its road in the City of St. Louis, which terminus is Papin avenue or Eighteenth street. (See Master's Report, Record, p. 207.)

Preliminary to the discussion of this proposition, we will call attention to the situation of, and the circumstances surrounding, the parties to the tripartite agreement at the date of its execution. Forest Park embraced a large body of land, containing 1,379 acres, which had been established as a park for the benefit of the people, intended principally as a driving park; Mr. Andrew McKinley being one of the Commissioners and President of the Board. This Board of Forest Park Commissioners had power, by Act of the Legislature of

Missouri, approved March 25th, 1874, to lay off, improve, adorn, and generally govern, manage and control the use of the park and the avenues surrounding it.

Before the execution of the agreement, neither the County Road nor the Kansas City Road had any railroad to the Union Depot. The County Road had located its line east and west of the park, and had purchased a right of way at different points along its line from the depot to the park, but had built no railroad. The location of its right of way through the park was undetermined at this time. The Kansas City Road had its depot for freight and passengers in the northern part of the city, some distance from the Union Depot. As, at that time, the Union Depot was the only general passenger depot in the city, and was reached by most railroads entering the city, the Kansas City Road determined to build a branch of its road from Ferguson, about nine or ten miles from the city, to the Union Depot, and thus avail itself of the better facilities for doing a passenger business, and to cross the bridge over the Mississippi with its trains.

The Kansas City Road in its agreement with the County Road declared it *required* this right of way.

Its branch line was located through the park. In its efforts to obtain the right of way through the park it came in contact with the County Road, which had the floating right of way before mentioned through the park. The Board of Forest

Park Commissioners controlling the park and its use, was conferred with by the two companies, with reference to an arrangement whereby a definite right of way could be secured for them through the park.

Mr. McKinley, President of the Board, states (See Record, page 85):

"That there was a great deal of discussion where the road should run; that the bill creating Forest Park contained this proviso,—that nothing in the Act should prevent the St. Louis County Railroad from obtaining a right of way through the park, provided they entered on the east side through Duncan's subdivision, running west and north of the River des Peres; that he had this proviso put in the bill, and it was intended to protect the park against the invasion of all railroads; that the effect of such invasion, he thought, would be very damaging to the park, upon the point of use and landscaping; that it was apprehended at that time the railroad would produce some great danger to persons visiting the park, and it was a long time before that public impression was relieved of the apprehension that horses would be frightened, and hence the proviso, that the road should be covered over with a cover or protected with trees. That the park represented an expenditure of $1,300,000: contained 19¾ miles of drives."

The position of The Kansas City Road, at that time, and that of the Colorado Road at the date of the filing of the bill in this cause, was practically the same. It wished to get through the park and was compelled to deal with the Park Commissioners in order to succeed. The Park Commissioners were willing on terms to give it the use of one right of way through the park, on

a certain line, and imposed conditions as to its use by other railroads, so as to protect as far as possible the park from invasion by other railroads on separate and independent rights of way. The Board of Commissioners in its efforts to accomplish this, expended $40,000 in aid of the construction of the railroad through the park.

To effect this purpose it can be seen that in view of the deep cut on the line of the Wabash Road, just east of the park, it would be difficult for any other road to enter the park from the east, on an independent right of way, and use the right of way of the Kansas City Road through the park, hence the provisions that this right of user of the right of way, by other railroads, applied not only to the right of way through the park, but also to the right of way from the park to the Union Depot.

The tripartite agreement came into existence under these circumstances. The first contention of appellants is, that by the terms of the agreement, the Kansas City Road was not bound to permit other railroads to use its right of way. This brings us to a consideration of the meaning of the terms of the tripartite agreement.

Appellants contend that the terms and conditions of the ninth section, requiring that "other railroads" shall be permitted to use the right through the park and to the Union Depot, were not, by the contract, imposed on the Kansas City Road.

This point is discussed in the opinion of the Court below, and is found in the Record, page 290. The Court says:

"It will be observed that, by the ninth paragraph, the County Road agreed to permit the use of its right of way by other railroads. Whether a like obligation was assumed by the Kansas Road depends upon the last sentence in the 12th paragraph, which purports to grant the Kansas Road the right to occupy and enjoy the right of way through the park, jointly with the County Road, on the *terms of the said contract between them and under the same terms and conditions as are hereby and hereinbefore imposed upon the said party of the second part, and which are hereby assumed by the said party of the third part* as to improvements, *except* the building of the depot and switch which the party of the second part is to do *itself*."

"It must be conceded that the meaning of this language is not perfectly clear. It is claimed by the defendants that the words, "as to improvements, except as to building, etc.," qualify not only the immediately preceding clause, commencing, "and which are hereby assumed," but also the one prior, commencing, "and under the same terms and conditions," and, therefore, that the terms and conditions as to improvements are those alone cast upon the Kansas Road. This would make the two clauses but a single compound one, qualified by the following relative clause, "as to improvements, etc." As against this, it must be observed, that, grammatically, a relative clause generally qualifies its immediate antecedent, and, therefore, in this case, would refer simply to that clause which provides for the assumption by the Kansas Road. This natural grammatical construction is strengthened by the punctuation, a comma after the words "party of the second part," and none after the words "party of the third part," which seems to separate the entire first clause from the second and its qualifying terms. I know that the matter of punctuation is never relied upon to defeat the obvious intent; but, when the meaning is doubtful, the punctuation is certainly a matter tending to throw light upon it. Further, there are not simply two but three antecedent clauses; the first one being "the terms of the said contract between them,"

that is, the two railroad companies; very clearly this qualifying clause does not refer to that; and therefore it should not be held to qualify the second, unless the obvious intent compels such construction. It is objected that the clause commencing "and which are hereby assumed," is, under this construction, superfluous. I think not. These improvements called for an expenditure of money, and the idea seemed to be that the Kansas Road should not only hold its right upon certain conditions, but as to those involving expenditure of money it should expressly assume the performance."

It is clear from the twelfth section, that the Kansas Road had in view the failure of the County Road to comply with the provisions of sections one to eight inclusive of the tripartite agreement, relating to the construction of the road, among which was the provision requiring the completion of the road within one year, under penalty of forfeiture of all rights under the agreement. The Kansas City Road by the twelfth section guarded against this contingency, by the provision, that in case said party of the second part (County Road), its successors or assigns, should forfeit all its rights, privileges, franchises, powers, immunities, improvements and property, in, through or upon said park, and in, into, through, over or upon said Forest Park, and in, into, through, over or upon said tunnel and cut, or, from any cause cease to have, maintain or enjoy the same, then it is hereby agreed and covenanted, that the party of the third part (the Kansas Road) shall not also be excluded from the said park, but shall, with its successors and assigns, continue to have, maintain and enjoy all of said

rights, privileges, franchises, powers, immunities, improvements and property, on the terms hereinbefore set forth, continuously and forever.

What are the terms hereinbefore set forth? In case of forfeiture of its rights by the County Road, the Kansas City Road becomes possessed of the whole right of way subject to the terms of both contracts, and that which before the forfeiture was held and enjoyed jointly by the two roads became the sole property of the Kansas City Road and its assigns, on the terms of the said "*contract between "them and under the same terms and conditions as "are hereby and hereinbefore imposed upon the said "party of the second part*" (the County Road).

What are the conditions "hereby" imposed upon the County Road? Among them are the conditions of the ninth section of the tripartite agreement granting the use of the right of way to other railroads, and this provision is a part of the said contract between them and one of the terms and conditions imposed by the tripartite agreement on both roads, which terms, as to improvements, are assumed by the Kansas City Road, except as to building the depot and switch in the park. This depot and switch the County Road was to build. That is to say that, inasmuch as by the first portion of the tripartite agreement down to section nine, the County Road stipulated and agreed to build a railroad within a certain time and erect certain buildings (depot and switch), the word "improvements" related to everything that was to be done in building under the contract, except the

depot and switch; it being provided in the eighth section that in case the County Road failed to complete the road in the park within twelve months it would forfeit all its rights under the agreement; in the twelfth section, the Kansas City Road, in view of the possible failure of the County Road to comply with the terms of the agreement, as to the construction of the railroad by it, and the consequent forfeiture of its rights under the agreement, and its possession of the right of way, sought to protect itself against the possible failure on the part of the County Road, by the provision that, in case of such failure, the Kansas City Road should not also be excluded from the rights, privileges and franchises, granted to the County Road, but that it, by becoming bound to make these improvements through the park, such as building the road, etc., should not be excluded, but should be substituted to the rights and obligations of the County Road, and enjoy the right of way subject to the same terms and conditions as were, by the contract, imposed upon the County Road. The reason for the refusal of the Kansas City Road to assume the building of the *depot* and *switch* is apparent. By the terms of the contract between the County Road and the Kansas City Road, of even date with the tripartite agreement (see Record, page 235), it is provided, "And it is further agreed and covenanted, that the party of the first part (the County Road), shall have and maintain the passenger depot in said park, as far as the parties hereto are concerned (that is the County and Kansas City

Roads), and that said party of the second part (the Kansas City Road), shall *not* have the power of stopping any of its trains *in the said park*."

If, under the agreement, the Kansas City Road had no right to use the depot or stop trains at it, it would not obligate itself to build the depot and switch, but, as it would use the right of way through the park (or the improvements, as designated in the contract), it was reasonable that the Forest Park Commissioners should require the assumption by it of the obligations of the County Road, in this regard. It was the intention of the parties to this agreement, in case the County Road failed to build the road, the Kansas City Road was not for this reason to be excluded from the park, but could, on its assumption of the obligations of the County Road to make these improvements, excepting the depot and switch, and subject to the other provisions of the contract affecting the County Road, continue to hold and enjoy the right of way under the same terms and conditions as were by the contract imposed on the County Road.

Such was the construction given to the contract by the Court below. This construction, in view of the situation of the parties at the date of the execution of the contract, is in accordance with the intention of the parties to it. The contract bears evidence of care and thought. The Park Commissioners desired to protect the park from the invasion of many railroads. Such invasion would have practically destroyed the park, hence the desire of the Board to confine all roads to one right of way.

To accomplish this it was necessary to give other roads the right to use this one right of way, and if this burden had been imposed only on the County Road and not on the Kansas City Road, which was then about to use this right of way, the purpose of the Commissioners would have been defeated.

See Hayes vs. Mich. Cent. R. R. Co., 111 U. S. Rep. 239.
Mason vs. Shawneetown, 77 Ill. 533.

Second. The covenants and conditions in the tripartite agreement, as to the use of the right of way by other roads, run with the land and bind subsequent purchasers.

Tulk vs Maxhoy, 2 Phil. 774.
Luker vs. Dennis, 7 Ch. D. 227.
Bronson vs. Coffin, 108 Mass. 175.
Whitsey vs. Union R'y Co., 11 Gray, 359-364.
Parker vs. Nightingale, 6 Allen, 341-344.
Van Doren vs. Robinson, 16 N. J. Eq. 256.
Kirkpatrick vs. Reshine, 24 N. J. Eq. 206.
Watson vs. McDermott, 2 L. R. Ch.App. 77.
Watertown vs. White, 4 Paige Chancery R. 510-513.

Appellants contend that, conceding that the Kansas City Road is bound by the provisions of the ninth section, the mortgagees or purchasing committee are not bound.

In Tulk vs. Maxhoy, 2 Phil. 774, it is held, that a covenant made by the purchaser of land, to effect that

56 Conn. Randall vs. Latham 48-53
If A agrees to convey to B a tract of land in consideration that B will convey to A an easement in certain other lands and A fulfills

he and his assigns would use or abstain from using the land * * * * may be enforced in equity against all purchasers with notice of the covenant, without reference to the question whether such covenant ran with the land.

See also Luker vs. Dennis, 7 Ch. D. 227.
Whitney vs. Union R'y, 11 Gray, 359–364.
Parker vs. Nightingale, 6 Allen, 341.
Watertown vs. White, 4 Paige, Chancery Rep. 510 (Walworth, Chancellor).

Held, That where lands are dedicated to the use of the inhabitants of a city for a public square, a bill may be filed in the name of the city to restrain the erection of a nuisance thereon or to protect the equitable right of the city to the use of the public square as such, and that a grantee of a lot adjoining a public square who has a special covenant from the original owner of the square that it shall be kept open for the benefit of his lot, may also file a bill in equity to restrain the grantor from violating the covenant and may join with the corporation in such suit, and such covenant runs with the land.

On page 514, Chancellor, in his opinion, says: "The covenant in the conveyance to Hersey, not to erect or suffer to be erected any tenement, edifice or structure on the street, highways or common, owned by the grantor in front of the premises conveyed, was a covenant running with the land." "It was the grant of a privilege or easement which passed to White under the conveyance from Hersey

to him, and no separate assignment of the covenant was necessary to transfer all of Hersey's interest therein."

President, etc. of the City of Cincinnati vs. Lessees of White, 10 U. S. 179.

Held, "It is not necessary that the fee of the land should pass in order to secure the easement to the public," page 184.

"All public dedications must be considered with reference to the use for which they are made," page 184.

"But it has been argued that this appropriation was a nullity because the proprietors, Denman, Ludlow and Patterson, when they laid out the town of Cincinnati, and appropriated this ground as a common in the year 1789, had no title to the land, as the patent or the patent to Symmes was not issued until the year 1794. It is undoubtedly true that no legal title had passed from United States to Symmes, but the proprietors had purchased from Symmes all his equitable right to their part of the tract which he had under his contract with the government. This objection is more specious than solid and does not draw after it the conclusions alleged at the bar," page 186.

Brew vs. Van Demen, 6th Heiskel, 433.

Held, A, the owner of a large town lot, sold and conveyed a part thereof to B, and covenanted that he would leave an adjoining strip ten feet in width,

"open forever for the public convenience and the use of the adjoining lots," held that this covenant ran with the land and is equivalent to a direct grant of an easement."

Winfield vs. Henning, 21 N. J. Eq.188.

Held, A covenant in a deed, it being expressly understood and agreed that the houses which may be erected on Gilbert street shall be set back ten feet from the southerly line of said street, is a covenant running with the land and binds not only those who derive title from the covenantors but also the grantees.

Ver Planck vs. Wright, 33 Wendell, 506.

Held, that a covenant by lessee not to cut wood, runs with the land.

Stockett vs. Howard, 34 Maryland, 121.

Held, that a covenant to maintain a fence or renew a lease, run with the land.

Whitney vs. Union R. R. Co., 11 Gray, 359.

Held, that conveyance of a lot of ground with condition that no offensive business should be conducted thereon, and if it has, any proprietor of land within the same lot might enter and abate the nuisance; held, that these restrictions might be enforced in equity against the assignee of the original proprietor.

But where a covenant does not run with the land, it nevertheless confers an equitable right in

the covenantee, as against a subsequent purchaser, with notice, and this right must exist if the instrument containing the covenant is a link in his chain of title.

Parker vs. Nightingale, 6 Allen, 341.
Vandoren vs. Robinson, 16 N. J. Eq., 256.
Kirkpatrick vs. Reshine, 24 N. J. Eq. 206.
Atlantic Dock Co. vs. Leavitt, 54 N. Y. 35.

Is the tripartite agreement a link in the chain of title of the mortgagees or purchasing committee to this right of way? In answer to this question "Exhibit X," found in the Record between pages 278-9, shows the location of the different rights of way (three in number) through the park; the first is that granted by W. D. Griswold, to the County Road, November 31, 1871. This was lost by non-user, as provided in the deed itself (Record, page 268). The second is that granted by the Commissioners, to the County Road, October 20, 1872, which passed no title for lack of power in Commissioners, the Act of Assembly appointing the Commissioners having been by the Supreme Court declared unconstitutional: Chouteau vs. Leffingwell, 54 Mo. 458, and the third, the right of way and line established by the tripartite agreement, August 11, 1875. This chart (Exhibit X) shows that the line granted by the tripartite agreement, is not identical with either of the other two lines. The Board of Forest Park Commissioners therefore were the grantors of every portion of the right of way

under the tripartite agreement, to the County and Kansas City Roads. The right of the mortgagees or the purchasing committee to now use and enjoy this right of way, is based solely upon this agreement. It is the *source* of their title, and is more than a link in the chain. If called upon to show by what warrant they are now using the right of way, they would be compelled to answer, that their warrant was the tripartite agreement. If they claim under it they are subject to all its terms and conditions, irrespective of the question of notice. They took the right *cum onere*, and the burden imposed is found in the muniment of title which gives the right.

Whitney vs Union R'y Co., 11 Gray, 359.

Held,—Stipulations not against public policy may be enforced against all who take the estate with notice of them, although they may not be strictly speaking real covenants, so as to run with the land, or of a nature to create a technical qualification of the title conveyed by the deed.

Vandoren vs. Robinson, 16 N. J. Eq. 256.

Held,—Specific performance of a deed will be decreed where condition in deed,—that property granted to A, with conditions that when she left actual occupancy, she would convey for a fair price, —A left conveyed property to C, through mense conveyances to D,—held, among other things, that D should convey to original grantor on payment

of price, as charged with notice of the covenant, although covenant was personal.

Tulk vs. Maxhoy, 2 Phil. 224.

Conveyance of land, "as pleasure garden," with provision that neighbors might use same for reasonable rent, with condition that grantor and his heirs would maintain said ground in such condition; passed by mesne conveyances to defendant, whose purchase deed had no such provision; admitted that the defendant had notice of original covenant. *Held*, that an attempt by defendant to build on said pleasure ground would be restrained. If there was a mere agreement and no covenant the Court would enforce it against a party purchasing with notice of it. The question does not depend upon whether the covenant runs with the land.

Luker vs. Dennis, 7 Ch. D. 227.

A covenant in lease granted by A to B, that B would purchase from A all the beer he used at that saloon, and that another lease from another landlord was held binding upon an assignee of the second saloon who had notice of the covenant.

Watson vs McDermot, I. L. R. Ch. App. 77.

The Wabash Company, the mortgagees and the purchasing committee had notice of the covenants and conditions of the tripartite agreement, prior to the execution of the mortgage under which they claim and are, therefore, bound by these covenants and conditions even though the covenants do not run with the land.

Third. The contention of the appellants that the record of the tripartite agreement does not impart notice because it was not acknowledged, is not well founded.

Where a purchaser is put on inquiry, he is deemed as purchasing with notice of all facts which such an inquiry would reveal.

Stephens vs. Smith, 7 Mo. 110.
Mense vs. McLean, 13 Mo. 298.
Meier vs. Blume, 80 Mo. 184.
Widdicombe vs. Childress, 84 Mo. 383.
Bishop vs. Schneider, 46 Mo. 472.
McCammant vs. Patterson, 39 Mo. 110.
Cockrell vs. Maguire, 10 Mo. 89.
Stephens vs. Hampdon, 46 Mo. 404.
Degnan vs. McCallum, 47 Mo. 375.
Musick vs. Berry, 49 Mo. 458.
Speck vs. Riggins, 40 Mo. 405.
Meier vs. Blume, 80 Mo. 184.
Widdicombe vs. Childress, 84 Mo. 383.
Maupin vs. Emmins, 407 Mo. 304.
Mense vs. McLean, 13 Mo. 298.

The Record shows that the Wabash Company was a corporation on the 14th day of August, 1879; it came into existence through a consolidation of a corporation known as the Wabash Railway Company and the St. Louis, Kansas City & Northern Railway Company. This consolidation was effected by virtue of statutes under which the Wabash, St. Louis & Pacific Railway Company consolidated, took all the property, rights and franchises, and assumed all the liabilities of the Kansas City Road. The Wabash Company, therefore, does not stand

in the attitude of a *purchaser* of the Kansas City Road; it is a consolidation of the two old companies. As set forth in appellants' statement, the consolidation was simply a change of name. If the Kansas City Road was bound by the terms of the tripartite agreement to grant to other roads the use of this right of way, on certain terms, the Wabash Company as consolidated was equally bound. Did the mortgagees and purchasing committee have notice of the terms of the tripartite agreement? The mortgage was executed in 1880 and the committee purchased in the year 1886. The tripartite agreement was recorded in the Recorder's office of the City of St. Louis, September 5th, 1879; the agreement was therefore recorded prior to the execution of the mortgage and prior to the purchase by the committee under it.

Bishop vs. Schneider, 46 Mo. 472.

Held, A deed not properly acknowledged, though recorded, is good between the parties or those purchasing with notice of it.

Stephens vs. Hampdon, 46 Mo. 404.

Held, That when the state of the title in the Record will lead a searcher for encumbrances, who is using common prudence and care in investigating the title, to a knowledge of the fact, the law presumes that he acquired knowledge of it.

Dignan vs. Coleman, 47 Mo. 325.

Were the mortgagees and purchasing committee put on inquiry? The two contracts and the deed from the County Road to the Kansas City Road, for an undivided half of its right of way granted to it, under the tripartite agreement all bear even date August 11th, 1875. But one was duly acknowledged and recorded, and this was the deed from the County Road to the Kansas City Road, which was recorded two days after its execution, August 13th, 1875 (Record, p. 147). It contains several important recitals and is a link in the chain of title of the mortgagees and purchasing committee. It recites that it is made in pursuance of the terms of a certain contract made and executed by and between the parties of the first and second parts (the County and Kansas City Roads), and dated August 11th, 1875, and is in full satisfaction of so much of said contract as relates to the conveyance of a certain piece of land and right of way to said party of the second part, etc. It contains also the following provisions (Record, page 252):

"And, also, that said party of the first part (County Road) hath conveyed, assigned, and transferred and by these presents doth convey, assign and transfer unto the said party of the second part (Kansas City Road), and to its successors and assigns, an undivided half of all the right, title and interest of the party of the first part of, in or to the right of way, and of, in and to any and all other rights, privileges, franchises, powers and immunities owned by or invested in or enjoyed, or that may hereafter be acquired or owned by or vested in or

enjoyed by the party of the first part (County Road) in, through or upon Forest Park, by any means or from any source whatever. All of which conveyances of the said right of way in this deed mentioned are made *subject to the terms and conditions upon which the same were granted* to the party of the first part (*County Road*), together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining."

It appears then that this deed refers to the contract of August 11th, 1875, between the County Road and the Kansas City Road and the terms thereof, and the Kansas City Road, the grantee, takes title subject to the terms and conditions imposed on the County Road by the tripartite agreement.

The reference to the contract in this deed put all parties to the deed, or their assignees, on inquiry as to terms of the contract. An inquiry into this would have led to a reference made to the tripartite agreement, of even date therewith, in the following language (Record, page 236), "And, whereas, under this agreement and a certain agreement between the parties hereto, and the Commissioners of Forest Park, of even date herewith, the party of the second part (Kansas City Road), is about to, and hereby in consideration of the covenants and agreements of the party of the first part (County Road), hereinafter particularly set forth, and of the covenants and agreements of said Commissioners of Forest Park, in said agreement with them contained, does

covenant and agree to maintain a railroad bed and road in, upon and through said Forest Park and the tunnel and cut hereinbefore specified, according to certain plans and specifications agreed upon according to the terms and conditions of said agreement with said Commissioners for the joint use of both parties of the first and second part hereto, their successors and assigns."

Therefore, having been put upon inquiry, and having become chargeable with notice of the contents of the contract of August 11th, 1875, between the County Road and the Kansas City Road, the mortagees and purchasing committee are also chargeable with notice of the tripartite agreement therein referred to, and bought subject to the terms on which the right of way described in said deed was conveyed.

Kirkpatrick vs. Peshine, 24 N. J. Eq. 206.
Atlantic Dock Co. vs. Leavitt, 54 N. Y. 35.
See authorities above quoted on this point.
Bishop vs. Schneider, 46 Mo. 472.
See other authorities under 3d point.
Kirkpatrick vs. Peshine, 24 N. J. Eq. 206.

Held, That a subsequent grantee, with notice of reservation of twelve feet, will be restrained from encroachment thereon.

Atlantic Dock Co. vs. Leavitt, 54 N. Y. 35.

Held, That the acceptance of a deed and enjoyment of the estate granted estops grantee and all persons claiming under him from denying his covenants.

But, if an action of covenant will not lie, a court of equity will restrain a grantee or those claiming under him from doing that which he has agreed not to do by the deed accepted by him, The agreement qualifies and attaches itself to the estate which he takes, and all persons claiming under this deed are charged with notice of the agreement and are bound by it.

Sinclair vs. Jackson, 8 Cowen, 585.

Held, that a man who admits a fact or deed in general terms, either by reciting it in an instrument executed by him or acting under it, shall not be received to deny its existence.

The acceptance of the deed operates as an estoppel upon the grantee, and those who claim under the grantor and his assigns or representatives.

Bishop vs. Schneider, 46 Mo. 472.

Held, That actual notice of an unacknowledged deed binds third persons; to same effect is

Stephens vs. Hampton, 46 Mo. 404.
Maupin vs. Emmons, 47 Mo. 304; also,
Macamant vs. Patterson, 39 Mo. 110.

Held, actual notice of an unrecorded deed binds third persons.

Mense vs. McLean, 13 Mo. 298.
Meyer vs. Blume, 80 Mo. 184.

Fourth. The mortgagees and their grantee, the purchasing committee, are bound by the covenants and conditions of the tripartite agreement, without regard to the question of notice. The covenant to permit other railroads to use the right-of-way created an easement in the property of the County and Kansas City Roads, for the benefit of the public and other roads which might wish to use the right of way not only through the park, but over the right of way between the park and the Union Depot. Such easement is charged upon the land conveyed, and runs with the land and binds all the other land mentioned in the covenant.

See Master's Report, Record, page 222.
Whitney vs. Union R'y Co., 11 Gray, 359-364.
See also Waterman on Specific Performance, Secs. 196-9-200.
Wilkers vs. Clements, 8 L. R. Ch. 96.
Perkins vs. Hudsell, 50 Ill. 216.
Stansbury vs. Trunger, 11 Gill & Johnson, 149.
Old Colony R. R. vs. Evans, 6 Gray, 25.
Cooper vs. Penn, 21 Cal. 403.
U. P. R'y Co. vs. McAlpine, 129 U. S. 305.
McMurray vs. Moran, 134 U. S. 150.

The three instruments dated August 11th, 1875, that is to say, the agreement between the County Road and the Kansas City Road; the agreement between the Board of Forest Park Commissioners and the County Road and the Kansas City Road, and the deed of the County Road to the Kansas City Road, conveying to the Kansas City Road,

subject to the terms of these two agreements, represented one transaction, relating to the same subject matter, and should be construed together as one contract.

The contract may be contained in several instruments, which, if made at the same time between the same parties and in relation to the same subject, will be held to constitute but one contract, and the Court will read them in such order of time and priority as will carry into effect the intention of the parties.

2 Parsons on Contract, 7th Ed. 634.
Makepeace vs. Harvard College, 10 Pickering, 298.
Odiorne vs. Sargeant, 6 N H. 401.
Hills vs. Miller, 3 Paige, 254.

So also, though the instruments are not made at the same time, if they can be connected together by reference to one another,—

Hagan vs. Van Renselar, 18 Johnson, 420.
Sawyer vs. Hammett, 15 Maine, 40.

In construing a contract the Court will consider the situation at the time of the parties and of the property which is the subject.

Parker vs. Great Western R'y Co., 7 Scott N. R. 870.

Held, Attempt by carrier to charge plaintiff more than it did others in the same business, to discriminate against him in his trade, under act of incorporation, providing that parties incorporated should be empowered to construct the railway and hold it as

their own and derive certain profits, but that every member of the community should have an equal right to use it on terms prescribed by Act. And it is to be observed that Acts passed under such circumstances (i. e. in favor of railroads) should be construed strictly against the parties obtaining them, but liberally in favor of the public. (Tindal, C. J.)

(Colman vs. Eastern Counties R'y Co., 10 Beaven, 14.) Application for injunction against defendant, to prevent it from entering into contract of speculative nature with a steamship company. Injunction upheld by Lord Langdale, M. R., on ground that the railroad being granted privileges for the public good, was bound to consider the public good and not risk its ability to so serve it.

See also Canal Co. vs. Wheeley, 2 B. & Ad. 793.
Gildart vs. Gladstone, 11 East, 685.
Blakemore vs. Canal Co., 1 My. & R. 165.
Lee vs. Milner, 2 Yo. & C. 618.
Ware vs. Canal Co., 28 L. J. Ch. 157.
Baxendale vs. Great Western R. C., 16 CB N. S. 137.
Doe ex., etc. vs. R. R., 14 M. & W. 694.
Webb vs. R. R., 1 R. Cases, 576.
Gray vs. R. R., 4 R. Cases, 240.
Chicago, etc. R. R. Co. vs. Iowa, 94 U. S. 161.

Each notice of the recitals refers to the other. These agreements are indentures and are executed by all the parties to the contract. It is well settled

that in an indenture the grantee takes the estate so granted subject to all the conditions and reservations contained in said deed.

Tiedeman on Real Property, Sec. 824.

The Record shows, that the Kansas City Road, under the agreements, completed its road through the park to the Union Depot in the year 1876. The said agreement between the County Road and the Kansas City Road, provides that the County Road was to pay to the Kansas City Road one-half the cost of the construction and maintenance of the road bed through the park and tunnel and cut, within two years from the 11th day of August, 1875, and that should the County Road fail or refuse to make payment for sixty days after demand for the same, after the same became due, then all the rights, privileges, franchises, powers and immunities, improvements and property of the County Road through or upon Forest Park and in, into, through or over the tunnel or cut were to become, by virtue or force of the failure or refusal, without further process or proceedings, forfeited and belong to the party of the second part (Kansas City Road) and as its successors and assigns, and in case of such forfeiture no further payments are to be made by the County Road, but the Kansas City Road is duly authorized and empowered to enter upon the sole and absolute possession and enjoyment of all said rights, privileges, franchises, powers, immunities, improvements and property to the exclusion of the County Road, and the County Road covenanted and agreed

upon its failure to pay as aforesaid, that it would, by good and sufficient deed, convey all of said rights, privileges, franchises, powers, immunities, improvements and property to the Kansas City Road; these provisions are a portion of the terms of the agreement between the County Road and the Kansas City Road.

Under these provisions the Kansas City Road having constructed its railroad through the park and to the Union Depot, came into the sole control and possession and ownership of this property. The two years within which the County Road had the right to pay to the Kansas City Road the one-half the cost of the construction expired in 1877. The County Road paid nothing and thereby forfeited all interest in the park right of way and through the cut east of the park.

By the two agreements and the deed the Kansas City Road obtained from the County Road an undivided half of the right of way through he park and other rights of way then owned by the County Road, between the park and the Union Depot, and by virtue of the two agreements, without further action, either by the County Road or the Board of Forest Park Commissioners, it became vested with the title to the whole right of way through the park, tunnel and cut, and became substituted under the agreements for the County Road.

All the obligations, and all the conditions imposed on the County Road, became the obligations of the Kansas City Road, except as to the building of the depot and switch in the park, and it came

under the conditions which were imposed on the County Road by the tripartite agreement. This agreement created an easement in the property of the County and Kansas City Roads, for the benefit of the public and the other roads which might wish to use the right of way not only through the park *but over the right of way between the park and the Union Depot.* This easement is not only a charge upon the tracks through the park, but also binds the tracks east of the park to the Union Depot.

See Master's Report, Record, page 222.
Whitney vs. Union R'y Co., 11 Gray, 359-364.
Parker vs. Nightingale, 6 Allen, 341-4.
See authorities cited under this point.

This permission to other railroads to use the tracks was a concession to the Forest Park Commissioners, and was one of the considerations for the grant of the right of way to the County Road, through the park, and the Kansas City Road obtained the title and the sole and exclusive possession of the right of way under the agreement providing for such permission. It would be inequitable and against good conscience to permit this road or its assigns, to continue to use and enjoy the right of way through the park and deprive the Commissioners or their successor, the City of St. Louis, of the benefit of the use of the track by other roads between the park and the depot, a right so valuable to them, as trustees of the public. This park, by its organic act, was dedicated to the use of the people of the City and

County of St. Louis and it was the duty of these trustees to preserve that use to the public, for park purposes. In their view, it was proper and necessary for protection of park that other roads should be permitted to enjoy the right of way not only through the park but should extend to the Union Depot. The Kansas City Road, in order to get through the park, subjected itself to this condition, and it and its assigns should be held to a strict compliance with it. In this case, the appellants, although enjoying the benefit of the $40,000 expended by the Commissioners, and of the right of way through the park, deny their liability under the agreement granting it these privileges without offering to return to grantors the property obtained by the agreement.

Ferguson vs. Wilson, 2 L. R. Ch. App. 77.
Bronson vs. Coffin, 108 Mass. 175.

Estoppel.

It is not for a party who retains the consideration of the contract to invoke the rule that the contract is against the policy of the law.

Bryant vs. Fairfield, 51 Maine, 146.

To make such plea effective he should restore, or be required to restore, all that he received as a consideration for the promise which he thus seeks to avoid.

Wiggins Ferry Co. vs. Chicago & Alton R. R. Co., 73 Mo. R. 413.

As stated by the Master in his report, Record, page 222, the license and grant for the right of way through the park by the Park Commissioners was a covenant that other roads should be permitted to use said right of way through the park and up to the Union Depot. It was in effect saying, "we will give you this right of way through the park if you will covenant that it and other property either now owned by you or about to be condemned for railroad purposes, shall be subject to the user of other roads. We require this for the protection of the park and in the interest of the public."

"This proposition was accepted and covenant made that other roads should use the right of way on equal terms. The legal effect was to create an easement in the property of the two railroad companies, for the benefit of the public and the park, and every road which wanted to use the right of way not only through the park but over the right of way between the park and the Union Depot. Such an easement is a charge upon the land conveyed and runs with the land and binds all other land mentioned in the covenant."

In accordance with this view, the Court below, in its opinion (Record, p. 294), says:

"It is argued with great force, however, by counsel "for defendants (Wabash Co.), even if the purchas- "ers were charged with the notice of the terms and "conditions attaching to the lands described, inas- "much as the Kansas City Road obtained a large "portion of its right of way between Forest Park and "the Union Depot from other sources, it took these "latter portions free from any burden cast upon "the lands specifically conveyed by the County

"Road. 'Can it be,' he says, 'that a condition in a "deed of a few feet of the right of way in a long "line of three hundred miles, casts a burden on the "entire line, to be assumed by every succeeding "purchaser?' I might answer this extreme case by "a reverse question. Can it be possible that a con- "dition attached to substantially the entire right "of way of this long line of road can be defeated "by the fact that some few feet have been acquired "by a deed free from such condition? But these ex- "treme cases do not constitute the practical matter "before us. Here the County Road had an incom- "plete right of way through the park and to the "Union Depot. A share of this incomplete right of "way is conveyed to the Kansas City Road subject "to certain conditions. Can it be that the comple- "tion by the Kansas City Road of this right of way "by purchase of intervening and isolated tracts de- "stroy the entire value of the conditions? Looking "at this matter in a practical way and from a reason- "able stand-point, I think the answer to this ques- "tion must be in the negative."

In Watson vs. McDermott, 2 L. R. Ch. App. 77, it is held, that where the owners of a row of houses covenanted severally with the original owner of the ground not to build in the garden attached to each house, the purchaser of the houses with notice of the covenant would be bound in equity even though the covenant did not run with the land.

In Bronson vs. Coffin, 108 Mass. 175, Gray, Chief Justice, on page 180, says: "An interest in the nature of an easement in the land, which the covenant purports to bind, whether already existing or created by the very deed which contains the covenant to do certain acts upon the land, for the support and protection of that interest and the beneficial use and enjoyment of the land granted, run

with the land charged, and an obligation duly expressed that the structures upon one parcel of the land shall forever be of a certain character for the benefit of an adjoining parcel, is equally a charge upon the first parcel, whether the obligation is affirmative or merely restrictive, and whether the affirmative acts necessary to carry the obligation into effect are to be done by the owner of the one or the owner of the other." And it was held by the Court, where there was a covenan to build a fence on a railroad, contained in a deed granting to the road a strip for the right of way, that this covenant was an incumbrance on all the remaining land of the grantor and ran with the land because the covenant gave the grantee an easement in the adjoining land of the grantor and ran with the land.

To the same effect is

Whitney vs. Union R. R. Co., 11 Gray, 359-364.
Parker vs. Nightingale, 6 Allen, 341.

In Union Pacific R. R. Co. vs. McAlpin, 129 U. S. 305-314, it is held, "that whenever property charged with a trust is conveyed to a third party, he will hold it subject to that trust which he may be compelled to perform equally with the former owner. The vendee in that case stands in place of the former owner." This case refers to exchange of lands. The Kansas Pacific R. R. got a deed and agreed to give a deed in exchange, made a mortgage, then consolidated with the Union Pacific R'y ;

the agreement was on record of Board only. Held that Union Pacific R'y must perform and give title free of mortgage.

McMurray vs. Moran, 134 U. S. 150.

Held, "That where contractor building railroad which had issued 310 bonds on 31 miles constructed road, and company agreed with Bank that it would issue no more bonds. On faith of this, Bank bought the bonds; in breach of this agreement Company issued 147 more bonds—Held, that the 310 bonds take priority over the 147 in hands of parties with notice of the agreement."

THE PARTIES HAD POWER TO MAKE THE AGREEMENT.

The County and Kansas City Roads were chartered under the General Statutes of Mo. (see Record pp. 266), 1865.

These Statutes (in force August 11th, 1875), chapter 63, section 14, p. 337, provide as follows:

"If any land belonging to a county, city or town "is required by any company for purposes of their "road, the county, city or town officers *having* "*charge of such land*, may grant it to *such* Com- "pany on such *terms* as may be *agreed* upon. * *

Also, section 32, p. 341 (General Statutes Mo.):

"All railroad corporations may contract with "each other, or with other corporations in any man- "ner not inconsistent with the scope, object and "purpose of their creation and management."

Right of way under tripartite agreement.

Fifth. The mortgagees and the purchasing committee claim the right of way established by the tripartite agreement, and this is the only right of way claimed by them or their grantors through the park and to the Union Depot. All claims theretofore possessed to any other right of way through the park were surrendered to the Forest Park Commissioners by the tripartite agreement (Record, p. 238).

The provisions of the tripartite agreement clearly show, that it was the purpose of the parties to the agreement that all rights through the park, save that granted and established by the tripartite agreement, were to be abandoned and surrendered to the Forest Park Commissioners. This agreement, in its first section (Record, p. 238), provides as follows: "That said Forest Park Commissioners, in consideration of the relinquishments, agreements and stipulations hereinafter contained on the part of the party of the second part (the County Road), do hereby *accept and approve* the line and grade of said railroad as laid down and described upon the accompanying plat and profile hereto attached and forming part of the agreement (see Plat. Record, between pp. 278 and 279 red line), and said line and grade, in case there is no forfeiture of this agreement, is hereby fixed as the *sole* and *finally established right of way* to which said party of the second part (the County Road) is entitled by statute or otherwise through said park or any part thereof."

The Record shows that the Forest Park Commissioners expended about $40,000 in complying with its engagements under the tripartite agreement.

Mr. McKinley, President of the Board of Forest Park Commissioners, testifies, that, at the date of the agreement, it was feared that the invasion of the park by railroad would greatly mar the landscape beauty of the park. That road would produce some great danger to persons visiting the park, and it was a long time before the public impression was relieved; that horses would be frightened, and hence there is a provision that the road should be covered, etc. (Record, page 86.)

The consideration for the expenditure of this $40,000 was the covenants and provisions of the tripartite agreement, which protected the park; that the park would have been defaced and injured greatly by other railroads that might thereafter be built through it. The Commissioners guarded against the contingency by the 9th Section granting permission to other railroads to use the one right of way. It cannot be said that this was an unreasonable precaution. It requires no stretch of the imagination to believe that a park, dedicated to the use of the people, to be used principally as a driving park, would be greatly impaired by the presence in it of steam railroads, with their many trains, freight and passenger, speeding through it, for those seeking recreation and pleasure.

In Hayes vs. Mich. Cent. R. R. Co., 111 U. S. 228—

Held, when the line of a railroad runs parallel with, and adjacent to, a public park, which is used as a place of recreation and amusement by the inhabitants of a municipal corporation, it is within the design of a statute conferring power upon the corporation to require railroad companies to protect against injuries to persons.

The above was held in a case where a public park in Chicago (Lake Park) *abutted* on the railroad, between the park and the lake were the railroad tracks. The municipal authorities required the railroad to erect a *fence* along the park next the railroad, to protect persons using the park. On the question whether the city had power to require the erection of the fence, the Court, on page 239, using this language: "To leave the space "between the park and the breakwater, traversed "by the numerous tracks of the Railroad Co., open "and free, under the circumstances in proof, was a "constant invitation to crowds of men, women and "children frequenting the park, to push across the "tracks at all points to the breakwater, for recrea- "tion and amusement, at the risk of being run down "by constantly passing trains. A fence upon the "line between them might have served, at least as "notice and signal of danger, if not as an obstacle "and preventive. For young children, for whose "health and recreation the park is presumably, in "part, intended, and as irresponsible, in many "cases, as the dumb cattle, for whom a fence is ad- "mitted to be some protection, such an impediment "to straying might prove of value and importance.

"The object to be attained—the security of the per-
"sons of the people of the city—was, we think,
"clearly within the design of the statute of the or-
"dinance; and the means required by the latter to
"be adopted by the Railroad Company was appro-
"priate and legitimate." Citing

Mayor, &c. of New York vs. Williams, 15 N. Y. 502.

The confining of railroads to one right of way through the park was in the interest of the public safety, and, as in above case, was within the power of the Park Commissioners to exact.

To further secure the right to the permanent use of this right of way to other railroads, this agreement provides, that, as the Kansas City Company "is about to construct, maintain and op-
"erate a railroad in, upon and through said park,
" * * * the party of the first part (the Forest
"Park Commissioners) does hereby grant, and con-
"vey unto and license and permit the said party
"of the third part (the Kansas City Co.), its succes-
"sors and assigns, to have, hold, use and enjoy said
"right of way, in, upon and through said park in
"common with and to be held and enjoyed jointly
"with the said party of the second part (the County
"Road) and its assigns, on the terms of the said
"contract between them, and under the same terms
"and conditions as are hereby and hereinbefore im-
"posed on said party of the second part, and which
"are hereby assumed by said party of the third part
"(the Kansas City Company) as to improvements,

"except as to building a depot and switch in said "park, which the party of the second part (the Coun- "ty Road) is to do itself."

Or, in case said party of the second part (County Road), its successors or assigns, "should forfeit "its said rights, privileges and franchises in, upon "and through said park, or from any cause cease to "have, maintain or enjoy the same, then it is hereby "agreed and covenanted that the party of the third "part (the Kansas City Road) shall not also be ex- "cluded from said park, but shall, with its successors "and assigns, continue to have, maintain and enjoy "all said rights, privileges, immunities, franchises, "improvements and property on the terms hereinbe- "fore set forth, continually and forever."

The 9th Section of the agreement imposed on the County Road the burden of permitting other railroads to use its right of way, and the 12th Section of the agreement provides, that if the County Road forfeits its rights in the park, the Kansas City Company is not to be excluded from the park, but may continue to enjoy the right of way, but on what terms? On the same terms as are hereby, *that is by the 9th Section*, imposed on the County Road.

The Record shows that the County Road built no road between the Union Depot and the north line of the park. It failed to pay to the Kansas City Road its half of the cost of construction of the road through the park, tunnel and cut, and hence forfeited all its rights in the park, tunnel and cut to the Kansas City Road. This company, under

the agreement, was not excluded from the park, but remained and used the right of way subject to the terms imposed by the 9th Section. It is submitted that this construction of the contract is the only construction which is consistent with fair dealing and the evident intention of the parties. By what right does the Wabash Company now occupy this right of way? There is no deed, license or grant, of any nature to it or those through whom it claims, other than this tripartite agreement. It is the muniment of title, the deed under which it claims the property, the right of way. Why, therefore, is it not bound by its terms? The Wabash is a party to the agreement. Upon the facts disclosed here, will a court of equity seek for some technical ground upon which to free the Kansas City or Wabash Company from engagements which, in equity it should fulfill? It now enjoys the fruits of the $40,000 expended on this right of way by the Park Commissioners under this agreement. It is not suggested that the Park Commissioners or the City of St. Louis have failed on their part in any respect to comply with the terms of the agreement. It may now be deemed a burden to permit another railroad, even for a fair compensation, to use its tracks and in a measure aid a prospective competitor in reaching the Union Depot, but it has been paid for agreeing to assume this burden. It received the $40,000 and valuable rights and franchises, and in addition is now receiving under the terms of the decree, in this case, six per cent on one-half the value of the

right of way ($500,000.) $30,000 per annum, and in addition expenses for maintenance of road and taxes on wheelage basis.

In construing a contract the Court will consider the situation of the parties at the time and of the property, which is the subject matter of the contract, and the intention and purpose of the parties in making the contract, will often be regarded of great service in guiding the construction, because * * this intention will be carried into effect so far as the rules of language and the rules of law will permit.

2 Parsons on Contract, p. 631.
Henely vs. Brown, 99 Mass. 545.

A party will be held to that meaning which he knew the other party supposed the words to bear, if this can be done without making a new contract for the parties.

2 Parsons on Contracts, page 631.

A grant to the public will be construed liberally in the interest of the public, and such construction will be given as will give effect to the grant, rather than one which will defeat it.

These are well established rules of construction. Apply them to these agreements.

1st. Situation of the parties. The Kansas City Road had no right of way or entrance to the Union Depot. In the first lines of the contract between it and the County Road, the declaration is made, by the Kansas City Road, that the line of its road

as established was continuous and connected with the County Road, and for the purpose of reaching the Union Depot it *required* a right of way over a part of the right of way of the County Road. This latter road could not obtain a right of way through the park, without dealing with the Forest Park Commissioners. These Commissioners intended to confine the railroads to one right of way through the park, and more effectually to bring about this result, imposed on the County and Kansas City Roads the provisions of the ninth section, relating to use of right of way by other roads, and paid a large consideration to obtain it. It is evident all parties to the agreement understood it at the time.

No words are used in either of the contracts to prevent the Court from adopting this understanding of the parties. If words and phrases should be found in the contracts of doubtful import, the Court would, nevertheless, give effect to the intention of the parties.

The first question that presents itself in construing a contract is, what was meant by the parties to it? What was their intention? This grant of the right to use of this right of way through the park and to the Union Depot by other railroads, was a grant to the Park Commissioners, who were trustees for the public, and, like all grants to the public or in its interest, will be liberally construed, The Court, therefore, is not required to examine these contracts as with a microscope for the purpose of discovering some refined technicality.

whereby the appellants may escape from engagements which, on a general view of the situation of the parties, justice and the interest of the public require should be met.

What was intended by the 9th Section?

This section is as follows: "Said party of the second part (County Road) *shall* permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park and up to the terminus of its road in the City of St. Louis, upon such terms and for such fair and equitable compensation to be paid to it therefor, as may be agreed upon by such companies."

From a consideration of both the contracts, it is clear, that it was the *intention* to grant other railroads the right to use the right of way under reasonable regulations and for a fair and equitable compensation. This being the *intention* of the parties, the Court will give it effect, unless, by the provisions of Section 9, taken in connection with the other provisions of the contracts, a different intention is clearly shown.

Words in a contract, inconsistent with the main intention, are to be *rejected*.

Dallman vs. King, 4 Bingham N. C. 105.

A contract must receive such a construction as will make it *operative* and capable of being carried into effect, if it can be done without violating the intention of the parties.

Boyd vs. Moyle, 2 C. B. 644.
Russell vs. Philipps, 14 Q. B. 891.
Jones vs. Gibbons, 8 Exch. 922.

It must be conceded that the phraseology of this Section is *awkward* and bears the marks of amendment after the first draft of the agreement. It would seem, from the peculiar construction of the Section, that this first draft read as follows: "Said party of the second part (County Road) shall permit under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park and up to the terminus of its road in the City of St. Louis." This part of the Section provides for the use of the right of way and also fixes the regulations and the terms. The following would seem to have been the amendment added: "Upon such terms and for such *fair* and *equitable* compensation *to be* paid *to it* therefor as may be agreed upon by such companies." It appears from the Record that this contract was under discussion by the parties for weeks prior to its execution. We may infer, therefore, that pending this discussion, or, as the result of it, this amendment was inserted for the purpose of more clearly fixing the basis of compensation—that is, the phrase "reasonable regulations and terms," as found in the first part of the Section, were not sufficiently definite, and, therefore, the amendment making the basis of compensation "fair and equitable" was added—thus intending, that the terms should not only be reasonable, but also, such as in the spirit of the agreement would be "fair and

equitable." The word "equitable" here is significant—it is found in a document fixing the legal rights of parties, which may be the subject of controversy in the Courts—in such connection, is it not a fair inference that the word "equitable" related to a compensation, which a court of equity on the facts would hold was right and proper? That it was not intended, this right to use the right of way could be defeated by a refusal to agree upon any terms, but that an "equitable" compensation must be accepted.

The County Road is bound to permit the use of the right of way for an equitable compensation. If this construction of this Section is correct, then the question as to the Circuit Court by its decree, making an agreement for the parties, is *out* of the case.

Sixth. The contention of the appellants that the ninth section of the tripartite agreement required that other railroads could use the right of way through the park and to the terminus of the road in the City of St. Louis, does *not* include the *tracks* and right of way, is not well founded.

> See opinion of Court below, Record p. 293.
> C. B. & Q. R. R vs Paddock, 75 Ill. 616.
> Challis vs. Atchison Ry. 16 Kas. 117.

The evidence shows that the entire right of way is occupied with tracks and sidings, so there is no

room for another and independent track, and, furthermore, that the entrance over the tracks of the Wabash to the Union Depot was the only practical route to the Union Depot for the Colorado Road. (See Record p. 84.)

S. T. Emerson testifies, that the Wabash Railroad was the most and only practical entrance to the depot for the Colorado Road. After the right of way was acquired by the Kansas City Road, it had the right, as it did, to cover its right of way with main and side tracks, so there was no room on its right of way for tracks of another railroad; if, therefore, the right of way is held not to include the tracks it was in the power of the Kansas City Road to defeat the terms and intention of the agreement. Right of way is strictly an easement, as distinct from corporeal property; while the meaning is not to be construed or defined arbitrarily or independent of the connection in which it is used in the contract, but in accordance with the sense in which the parties used the word.

Williams vs. W. U. T. Co., 50 Wis. 71.
C. B. & Q. R. R. vs. Paddock, 75 Ill. 616.
Challis vs. Atchison Ry, 16 Kansas, 117.

Furthermore, the County Road and the Kansas City Road were, by the tripartite agreement tenants in common of this right of way through the park and to the east end of the cut, so the County Road had the right to use the whole right of way subject to the right of the Kansas City Road to use the whole, and hence the grant to other roads to

use the right of way applied to the whole right of way through the park, and to no particular part of it. Again, the track of a railroad cannot be separated from the right of way upon which it is placed. The right of way is the principal thing, the track merely an incident. The ties and iron rails, when placed on the right of way, bear the same relation to the right of way that the house does which is located on the ground of the owner.

It is a sound proposition of law, that an unconditional conveyance of the lot on which a house stands would carry the title to the house, so in this case, the conveyance of the use of the right of way would carry also the use of the superstructure upon it.

It appears from the evidence that the superstructure in this case, placed upon the right of way, to-wit, the rails, is such a superstructure as from the nature of the use granted is valuable to those to whom it was granted, and was within the contemplation of the parties when the grant was made. A grant of anything is a grant of everything necessary to the enjoyment of the thing granted—the tracks are necessary to the enjoyment of the right of way. The Record shows that the Colorado Road is of the same gauge as the Wabash, and also that it is entirely practicable for this road to use these tracks, from the north line of the park to the Union Depot, subject to the reasonable rules and regulations of the Wabash Company.

Mr. Talmage, the manager of the Wabash Road, on page 114 of the Record, says: "That it would be

practicable for another road, subject to the rules and regulations of the Wabash, to use the tracks from the north line of the park to the Union Depot.

The record shows many instances of *such* use, as testified to by Mr. Howe, Vice Prest. Wabash Co.

Wabash Company now *uses track* of C. B. & Q. Road from Camp Point to Quincy (Record, page 122) *compensation* interest on *half* valuation—uses also tracks of Peoria & Pekin Road from Hollis to Peoria—uses track of another road, three and a half miles, to Union Depot at Detroit—on same terms. Pennsylvania Company uses Wabash Road from Indiana line to Logansport (Record, page 123), uses five and a half miles track of Louisville, New Albany & Chicago tracks from Hollis to Indiana line, on same terms (Record, same page).

Mr. Howe further states (Record, pages 123 and 124), that the terms on which the use of the above named tracks was had, are fair and equitable, and such terms are so common "that it is almost a rule to adopt that as a standard." The *terms* fixed by the decree are those which Mr. Howe and the appellants say are the *standard* terms as to use of tracks of other roads.

The Record shows many other instances of such use.

Seventh. Appellants having failed to except to that portion of the Master's report (Record,

p. 235), holding that the Colorado Road was entitled to use the Wabash tracks, and having thereby waived any objection thereto, will not be heard on this point in this Court.

The Master, to whom this cause was referred, was ordered by the Court to set forth in his report the facts as well as his conclusions of the law. (See Record, p. 64), and in his report, (see Record, p. 225), says: "The contract of August 11, 1875, provides for the general use of appellants' right of way through the park, tunnel and cut, and also for the laying of a third rail, at designated points, and provide for the regulations for such joint use. In view of these facts, and that the pleadings show that the whole of this right of way is merged in the Wabash by forfeiture and by subsequent covenants, and that the Wabash is so constructed that another track could not be placed thereon, it would seem that equity would require the intervenor to be permitted to use the present tracks." The bill prays for the use of the tracks as part of the right of way. Appellants filed twelve exceptions (See Record pp. 226 to 233), and in none of them is objection made that the Master erred in awarding the *use* of the *tracks* under grant of the use of right of way. All the exceptions proceed on the assumption that if the Colorado Company under the agreement is entitled to the use of the right of way, this right carries with it the use of the tracks on the right of way. (See opinion of the Court, Record, page 293.)

The Court says: "The term right of way has "a two-fold signification. It sometimes is used in

"describing a right belonging to a party, a right "of passage over any tract, and it is also used to "describe that strip of land which railroad com- "panies take, upon which to construct their road. "Obviously, in this paragraph (referring to the 9th "section), it is used in the latter sense; through "both of these contracts the terms 'right of way,' "'track' and 'road-bed' frequently appear, and in all "cases the term right of way is used as descriptive "of the strip above referred to. Notably in the 5th "paragraph is the distinction between the 'right of "way' and 'track' disclosed, in which it is provided "that the depot shall be built outside of the right "of way, but immediately adjoining the track. "Now, the right of way through the park, as given "by the Griswold, deed was 40 feet, as fixed by the "contract with the Forest Park Commissioners was "70 feet, and by this present agreement 42 feet. So "the County Road conveyed to the Kansas City "Road, outside of the park, a strip either 20 or 30 "feet in width, for this right of way. My thought at "first was, that the intervenors could only claim a "right to use so much of this right of way as was "not in fact occupied by the track of the Wabash, "and that all that was intended by this 9th para- "graph was to permit other railroad companies to "occupy and use so much of the Kansas Road's "right of way, as it did not itself occupy and use, "but after reflection on the arguments of counsel, I "have been led to the conviction that this was too "narrow a construction and was not the real intent "and purpose." The Master in his report shows "that the entire right of way is occupied by the "tracks and sidings, so that there is no room for "another and independent track, and as there is "nothing to show that this occupation has not been "made in good faith and to supply the needs of the "Wabash Company, if my first interpretation had "been correct the intervenors would plainly be "without any rights. I think, however, the true "construction is this: That the Kansas Company "was to have the first right, a right not limited to "its necessities, but as broad as its convenience, sub- "ject, and only subject, to such prior right other com-

"panies were to have the use of the right of way, and "if the respondent's business compelled the occupa- "tion by its tracks or sidings of the entire right of "way, but the convenience of its business would "permit the use of those tracks and sidings by another "road, then such other road would be entitled to the "use of both the right of way and the tracks and "sidings. This construction is, I think in accord- "ance with the obvious intent of the parties who "were contracting for general rights and not fix- "ing the specific details."

Eighth. Appellants having denied the right of respondent under the tripartite agreement to use of the right of way, it became necessary, in order to establish the right for respondents to file their bill in equity, and the Court having taken cognizance of the question of the right, had the power to settle both the question of right and the amount of compensation. It is a familiar rule in equity, that where the Court obtains jurisdiction for one purpose, it will determine the whole case. (See Record, p. 295.) This the Court below did, and in effect enforced the specific performance of contract.

Dinham vs. Bradford, 5 Ch. App. 519.

An agreement to *sell* at a *fair* valuation may be executed through a bill for specific performance.

Tillet vs. Charing Cross Bridge Co., 26 Beavan, 419.

In *Raphael* vs. *Thames Valley Railway*, held that in deciding whether specific performance should be enforced against a railroad company, the Court must have regard to the interests of the public. Law Rep. 2 Eq. 37.

Tscheider vs. Biddle, 4 Dillon, 55.
Biddle vs. Ramsey, 52 Mo. 153.
Arnot vs. Alexander, 44 Mo. 27.
Hug vs. Van Bunkles, 58 Mo. 202.
Gregory vs. Mighell, 18 Vesey, 328.

The right to use the tracks is a continuing right. If remitted to an action at law for damages, a multiplicity of suits must ensue—to prevent this equity ta· es jurisdiction.

Testimony was taken before the Master, as to what amount would be a fair equitable compensation for the use of the right of way. The Master ascertained the value of the right of way and recommended that respondent pay for its use on a wheelage basis, and that the Colorado Company use the right of way, subject to the rules and regulations of the Wabash Road, as to the running of trains, etc., and the decree (Record, page 284) is in accordance with this recommendation of the Master, as to the running of all trains, engines or cars of the intervenor, the said St. Louis, Kansas City & Colorado Railroad Company, over said right of way and tracks * * * shall conform to the rules and regulations now in force and such other reasonable rules and regulations as may hereafter be adopted by said Wabash, St. L. & P. R'y Co. or its

said receivers, to enable said intervenor to fully enjoy the benefits of this decree, and that the trains of the said railroad company, intervenor, shall be so regulated that at least eight minutes, if necessary, shall intervene between its trains and the trains of the Wabash Road at any point between the north line of Forest Park and 18th street, and that the sole control and regulation of the running of the trains of the said compani s shall be under this decree in the Wabash, St. Louis & Pacific R'y Co. and its receivers, and subject to the *further* order of this Court; *as to basis of compensation*, the Court overruled the Master and adopted that urged by appellants.

The practical difficulty suggested by appellants in enforcing respondent's right to use these tracks is imaginary in the light of the decree above quoted. It is a matter of public notoriety that railroads frequently have, by agreements with other roads, permitted such other roads, for compensation, to use their tracks under substantially the regulations fixed by this decree.

The Wabash Company makes the time table and regulates the going out and coming in of all trains, whether they be their own trains or the trains of the Colorado. By reference to the decree it appears that the running of all trains, engines or cars of the Colorado over the right of way and tracks of the Wabash, shall conform to the rules and regulations now in force, and such other reasonable rules and regulations as may hereafter be adopted by the Wabash or its receivers, and that the trains of the

Colorado should be so regulated that at least eight minutes, if necessary, should intervene between its trains and the trains of the Wabash Company, at any point between the north line of Forest Park and Eighteenth street, and that the sole control and regulation of the running of the trains of the said company shall be in the Wabash Railway or its receivers. The Kansas City Road, prior to this litigation, was of opinion that the regulations as to running of the trains on terms fixed by the decree were practical. See agreement between County and Kansas City Roads, dated August 11th, 1875 (Record, p. 235). "But it is hereby agreed and covenanted, that to accommodate the running arrangements of the party of the second part (Kansas City Road), said party of the second part shall have the absolute and sole control of the running, starting and regulating of the time tables of and for its own trains; and it is further agreed and covenanted, that no train, locomotive, car or other conveyance of the party of the first part (County Road), its successors or assigns shall be allowed or attempted to be started or run within eight minutes of the time fixed or stated for the starting, coming in or running of the train or trains of the party of the second part, its successors or assigns; and there shall be twenty minutes' time between the starting and coming in of the trains of the party of the second part (Kansas City Road), and this matter as to said specified times shall be under the sole control and regulation of the party of the second part."

In many respects the terms of the decree affecting the running of the trains are identical with those

above quoted. It must be noticed, however, that the terms of the decree which give to the Wabash Company the sole control and regulation of all trains of both companies, is more liberal to the Wabash Company, and more conducive to the safety of the public, than those of the contract above mentioned. The contract gave the Kansas City Road control of its *own* trains *only*, the decree gives it *control* of *all*, with the proviso that the trains of the Colorado Company shall not be started or run within eight minutes of the time fixed or stated for the starting, coming in or running of the trains of the Wabash, the same period of time fixed by the agreement between the County Road and the Kansas City Road. By the decree the Wabash Company is simply required to make reasonable rules and regulations for the running of the trains of the Colorado Road. They fix the time table and the trains are operated on their tracks subject to their rules and regulations, so long as the train occupies them. But, it is suggested, that, although the right of user exists and it is practicable for the Court by its decree to regulate the use so that the right can be enjoyed, still this covenant as to use could not be enforced, because the details as to manner of use of the right of way are not set forth in the agreement, and that the Court will not decree a performance of a series of acts or where a series of orders are to be made by the Court. Treating the two contracts of August 11th, 1875, as one contract, as before stated, it is submitted that the details as to manner of use are furnished by this

agreement of the parties, and are found in the Record, p. 235, and that in the performance of this decree there is not a series of orders to be made by the Court.

City of Marshall vs. Texas Pacific R'y, page 136 U. S. 405, relied upon by appellants, is not in point. There the City of Marshall attempted by an injunction to prevent the removal of the shops of the railroad from Marshall, and to have restored such portions as had been removed. The Texas Pacific having agreed with the City of Marshall many years prior, to establish its permanent shops at Marshall, in consideration of a bonus of $300,000, in bonds of that city. The shops were established at Marshall, and had remained there a period of about eight years, at the date of the filing of the bill. The Court held, first—that the obligation to establish the shops *permanently* at Marshall, was *satisfied* by keeping them there a term of *eight years*. Furthermore, the Court says, on page 405:

"We have already shown that to decree the specific enforcement of this contract is to impose upon the company an obligation, without limit of time, to keep its principal office of business at the City of Marshall, to keep its main machine shops there, and its car works there, and its other principal offices there, although the *exigencies* of railroad business in the State of Texas may imperatively demand that these es ablishments, or some of them, *should be removed* to places other than the City of Marshall, and that this would be also required by the *convenience* of the *public*, in which case both the *public* convenience and the best interests of the railroad company would be sacrificed by a contract which is perpetual, that all its business offices and business shall forever remain at Marshall."

Again, the Court held that the city was not without remedy at law, and could be fully compensated by an action at law, for damages. On this point, the Court says:

"It appears to us that if the City of Marshall has under such a contract a remedy for its violation, it is much more consonant to justice that the injury suffered by the city should be compensated by a single judgment in an action at law, and the railroad placed at liberty to follow the course which its best interests and those of the public demand. Nor do we see any substantial difficulty in ascertaining this compensation. Though there may not be any rule by which these damages can be estimated with precision, this is not a conclusive objection against a resort to a court of law, for it is well known that in all judicial proceedings for injuries inflicted by one party on another, whether arising out of tort or out of contract, the relief given by way of damages is never the exact sum which compensates for the injury done, but with all the rules which have been adopted for the measurement of damages, the relief is only approximately perfect."

The Court, therefore, held that the City of Marshall had a complete remedy at law, but made further objection that if the Court rendered a decree restoring all the offices, machinery and appurtenances of the road which have been removed from Marshall to other places, it must necessarily *superintend the execution* of the decree, and cites the case of Marble Co. vs. Ripley, 10 Wallace, 339-358, in which the Court said: "another serious ob-"jection to a decree for a specific performance is "found in the peculiar character of the contract "itself, and in the duties which are required of the

"owners of the quarries. These duties are continu-
"ous They involve skill, personal labor and culti-
"vated judgment. It is in effect a personal con-
"tract to deliver marble of certain kinds, in blocks
"of a kind that the Court is incapable of determining
"whether they accord with the contract or not. The
"agreement being for a perpetual supply of marble,
"no decree the Court can make will end the contro-
"versy.

We submit that the reasons above stated for refusing a specific performance in that case do not apply here. The decree of the Court below in this case simply fixed the compensation for the use of the right of way, under the contract, which is fair and equitable, as the contract requires, and orders that respondents shall use the tracks in conformity to the rules and regulations now in force, and such other reasonable rules and regulations as may be hereafter adopted, by the Wabash Company, or its receivers, and that the trains of the Colorado Road shall be so regulated that at least eight minutes shall intervene between the trains of the Wabash, etc."

The decree is self operating and self executing. After the decree nothing remains for the Court to do.

Where it is necessary for one railroad in the exercise of rights granted, to use the track and superstructure of another company, it may do so, although such structure is not expressly named in the instrument granting the right.

In Wolverhampton vs. London & N. W. R'y Co., 16 L. N. Eq. 433, the Court says, "The Court made

an injunction restraining the defendants from carrying a portion of traffic by other lines which ought to have passed over plaintiff's line, under the contract.

117 U. S. Express Cases, 29.

"The legislature may impose a duty, and when "imposed, it will, if necessary, be enforced by the "Courts, but unless a duty has been created either "by usage, or *by contract*, or by statute, the Courts "cannot be called on to give it effect."

This was said by this Court in cases where the express companies sought to restrain the railway companies from refusing to carry express matter on *terms* of *contracts* which had *expired*, but the Court holds, if there had been a subsisting contract, it would have granted relief.

This Court, in the Big Cañon case, R. R. Co. vs. Alling, 99 U. S. 463, enjoined the Atchison Road from preventing the Denver Road from using the right of way through the cañon and fixed the compensation.

On page 481, the Court says: "If, in any por- "tion of the Grand Cañon, it is impracticable or "impossible to lay down more than one road-bed "and track, the Court, while recognizing the prior "right of the Denver Co. to construct and operate "that track for its own business, should, by proper "orders, and *upon such terms* as may be just and "equitable, establish and secure the right of the "Cañon City Company, conferred by the Act of "March 3d, 1875, to use the same road-bed and "track, after completion, in common with the Den- "ver Co."

This action of the Court was based on an act of Congress, granting the right of way. Here the Forest Park Commissioners, or the city of St. Louis, are the Congress or sovereign making the grant, and the same line of construction and action by the Court should be pursued.

R. R. Co. vs. Alling, 99 U. S. 463.
See opinion of Court, Record, p. 295-6.
Wolverhampton vs. London & N. W. R. R.
1 L. R. Eq. 433.
22 American & English R'y cases, page 265.
C. & C. R. R. Co. vs. N. Y. E. & W. R. R. Co.
5 D. and S. 138. Great Northern R'y vs. Manchester R'y.

The Wabash is insolvent, in possession of *receivers;* such *receivers* are parties to the bill; an action at law for damages (if indeed such action would have afforded a complete remedy) would have been unavailing. But the value of this right to use the tracks cannot be measured nor estimated in dollars and cents. From the nature of the right, specific performance is the only complete remedy; if this is denied, appellants are without remedy. It is a familiar maxim that where there is a *right* there is a *remedy.*

Toll Roads.

Railways are common carriers, they owe certain duties to the public from which they cannot escape. The courts are ever ready to find a remedy by which they will be compelled to discharge these

duties—they involve the public interest and the public safety. Recently these railway companies have, through extensions and consolidations with others, grown into great and widespread systems, having for their head the large cities of the country; these developments naturally work a change in the manner of doing business. We hear now of *terminal roads*, that is, roads whose business it is to extend from these cities out to a convenient point and there offer the use of their tracks to incoming roads for a compensation. Obstacles have, within a few years, grown up in large cities, which make it exceedingly difficult and expensive to a railroad to obtain entrance to any general depot. These difficulties affect trade — increase cost of carriage and inconvenience the public. Hence the need of the *terminal tracks*. In England, by the Act of 8 and 9 Victoria, Chap. 20, Sec. 97, toll roads were authorized. These roads own the tracks, and for certain *tolls* or *compensation*, permit the engines and cars of others to use them, subject, however, to their rules and regulations. On tender of the amount of the toll, they *must* grant the *use*. So here, as to the County and Kansas City Roads, they, by the agreements, made the *four miles* of their road a quasi toll road for the use of the engines, cars, etc., of other roads. Railways in Missouri, by statute, are declared to be public highways. (See 1 Rev. Stat. Mo., page 667.) A railway company cannot refuse to carry goods on tender of the amount of the *freight* — if no fixed rate is named, then the rate is a reasonable rate, and on such *re-*

fusal, a court of equity would enjoin them from refusing. Here respondents offered to pay a fair and equitable compensation, this offer *was* refused, not for the reason the amount or the terms were not satisfactory, but *because* they denied the right on any terms or for any compensation, permit *use* of the right of way. It seems reasonable that *injunction* should lie against them in view of such refusal as in the instance above mentioned. Appellants do not now complain of the *amount* of the *compensation* or charge that either is unfair or inequitable, nor that the *rules* for operating the trains are not reasonable as fixed by the decree—they are the same as those imposed by Act of Parliament in England on Toll Roads, and in force for more than 40 years, and such as appellants concede are equitable and practical.

Tenth. The objection that there is no mutuality in the contract and therefore it can not be enforced, is not well taken. (See opinion of Court, page 297.)

By the terms of the tripartite agreement, appellants obtained the right of way through the park, which they desired, and in consideration of the covenants embraced in the 9th section and other sections of the tripartite agreement, $40,000 was expended by the Forest Park Commissioners in aid

of the construction af the road through the park, upon this right of way. Under the agreement, there are things to be done by each party for valuable considerations, to be paid one to the other. It is admitted that the Park Commissioners have complied in every respect with all the terms and conditions of the agreement, by them to be performed, but appellants refuse to perform by permitting enjoyment of easement they granted — one easement was granted in consideration of another. The want of mutuality is urged by appellants when they are called upon to comply with the covenants which were valuable to the City of St. Louis, as the successor in right of the Park Commissioners, and valuable to the public also, whom the city represents. They claim that the want of mutuality consists in the inability of the appellants, under the agreement, to keep other railroads that may use its tracks from discontinuing such use, and because the contract, as they made it, did not specify the period during which such other roads should be required to use their tracks, it is devoid of mutuality.

See Master's Report, Record, p. 223.
Commonwealth vs. R. R., 24 R. 160.

Eleventh. The provisions of the tripartite agreement tend to confine all railroads passing through the park to one right of way, and thus preserve, as far as practicable, the integrity and beauty and safety of the park, as a driving park, are covenants or grants in the interest of the

public, and should be liberally construed in favor of the public. The circumstances surrounding the execution of these agreements point unmistakeably to the conviction entertained by the Park Commissioners, that the penetration of the park by railroads would be a great detriment to the park. The President of the Board has so stated. (See Record p. .) It is reasonable to suppose they were all of the opinion that it would be impossible, by reason of the demands of commerce, to prevent for all time the construction of railroads through the park. This park occupying a large area, 1379 acres, lying almost adjoining a large and growing city, could not reasonably escape the invasion of railroads; that it was wise in the first instance to anticipate this and make provision for them by the establishment of a right of way which could be used by all; otherwise the park might be gridironed by different lines of railway and practically destroyed as a park. Hence it was that the Board of Commissioners, as a condition of the grant of the right of way as established by the tripartite agreement, imposed the terms found in the 9th and 12th sections. The fact that the Park Commissioners faithfully and strictly complied with the provisions of the agreement on their part; that the grantees of the Kansas City Road are in possession of the park right of way, without offering to surrender it or the $40,000 which they received, and contend that they can keep the consideration and still in a court of equity escape the burdens imposed by the agreement is a position which in our view a court of

equity will not tolerate. They insist on the one hand that the County Road had no power to bind itself to grant the use of its right of way east of the park. That this portion of the contract was *ultra vires*. If this were true would this Court, sitting as a court of equity, hear them to say that this contract was *ultra vires* in this particular? They stand before the Court with the consideration in their pocket and no offer to surrender. In such case fair dealing would require that these appellants restore to the City of St. Louis, as the successor of the Commissioners, the right of way granted and the money which was paid, before they would be heard. There is no pretense on the part of the appellants that such offer to restore the consideration has been made. In numerous cases decided by this Court, it is held that under such circumstances equity would not grant relief, even if the contract be *ultra vires*. On examination of this agreement, we find it provided for its ratification by the stockholders of both companies. The Statutes of the State of Missouri, 1st Volume Wagner's Statutes, 1872, p. 315, Sec. 57, authorizes railroad companies which have lines that are continuous and connected to make agreements of this character; the joint use of their line or tracks was in the interest of commerce. They are in harmony with the public policy of the State of Missouri.

The agreement between the County Road and the Kansas City Road was made under the provisions of the 57th Sec. in 1st Wagner's Missouri Statutes, p. 315, above referred to. This appears from the first part of the agreement (Rec. p. 233), which

reads as follows: "That the party of the first part "(County Road), a railroad corporation of Missouri, "having acquired the title to the right of way over "numerous pieces of land along its route, for a rail- "road as designated on "Chart A," hereto annexed, "and the deeds for which are herewith shown, to the "party of the second part (Kansas City Road), and "the party of the second part being also a railroad "corporation of Missouri, and the lines and routes "of said companies as now established being con- "tinuous and connected in this State, and for the "purpose of reaching the Union Depot of St. Louis, "Mo.. and other purposes, the party of the second "part (Kansas City Road) desiring and *requiring* "a right of way and the real estate necessary to es- "tablish and maintain its route thereto forever." This Sec. fifty-seven authorized railroad companies of Missouri, whose *lines were continuous and connected* in this State, to make an agreement such as was made. The Kansas City Road here solemnly declares that it required an entrance to the Union Depot, through the park and over the line of the County Road as then established. The fact that every piece of the right of way on that line had not been acquired was of smaller importance than the line. The establishment of a line by a railroad and the rights that accrue to it by reason of such establishment are valuable. Under the laws of Missouri, no other railroad could adopt it. It is well known that it is difficult for railroads to obtain entrance to centers of business in large cities. The difficulties here are apparent. There was a cañon

through which the County Road and Kansas City Road must pass. The Park Commissioners and the City of St. Louis owned the cañon. The Union Depot, the point where the railroad traffic centered, was the goal at the end of the cañon.

This line, therefore, of the County Road, which the Kansas City Road required, and which it soon afterwards absorbed, was the prime object of these contracts. This line from the north line of the park to the Union Depot was the entirety. Any burden placed upon a portion thereof covered the whole, and the whole was intended to be covered. The whole was the thing wanted. The whole was obtained, and the whole the appellants po sessed and enjoyed not only at the date of the filing of the bill in this cause, but at the date of the execution of the mortgage under which the purchasing committee claims.

Nuisance.

The loss of this right of user of these tracks by other roads would create a nuisance and ought to be prevented. The remedy is by injunction to restrain the damming up of a stream, when the overflow on adjoining lands caused by backing up of the water would be a damage to them; also to prevent the diversion of a stream to the special injury of property holders. These tracks are the bed in which has flown for many years, the railroad traffic from a certain locality; great property interests have grown up. Millions of dollars have been ex-

pended in a great park through which this stream flows; dam up this stream as proposed by appellants and what is the inevitable result? These "other railroads" must force their way at other points, through the park. This park will be overflowed with railroads and not only injured but practically destroyed as a driving park. People driving with their families for pleasure do not seek proximity to steam railroads—they are things to be avoided.

The Park Commissioners of the City of St. Louis made the simple agreement with the County and Kansas City Roads that it would permit this stream to flow through their park, on condition that it should also continue its course through the property of the railroads to the Union Depot.

It is not claimed that technically under the facts the City of St. Louis could now maintain a bill against appellants on the ground of nuisance, because no other railroad is now attempting to obtain an independent right of way; if, however, appellants' position here is sustained the nuisance mentioned will come. Such a result serves to emphasize the strong equity of respondents in their prayer for relief on the bill as framed.

Twelfth. The contract permits other roads to use the tracks of the County and Kansas City roads, and the decree gives the use of the tracks, including turn-tables and other terminal facilities of the Wabash Company, on its right of way. The

record shows that the width of the right of way of appellants at Tayon avenue or 18th street, being the terminus of the road at the Union Depot, is about 40 feet. This is shown by Chart A, in evidence. The side tracks, turn-outs, etc., mentioned in the decree at the terminus are upon this 40 feet, which is the right of way. Appellants have no depot of any kind, freight or passenger, to be used by any other road—the turn-table, of course, is necessary for use of the tracks, as also the switching and sidings.

Respondents, under the decree, could only use what the evidence showed appellants had, hence there is nothing in the contention that the decree is broader than the provisions of Section 9, or the prayer of the bill.

The Record further shows that the Union Depot Co. take charge of all trains, and have side track facilities for loading and unloading trains. (See Record, p. 115.)

City of St. Louis.

The City of St. Louis has throughout this case been by the appellants treated as a nominal party merely. The Record shows, it is a party in interest. It occupies a two-fold position. It is charged with the duty of protecting and preserving its commerce. Good terminal facilities on equitable terms for railroads are a great attraction for commerce. These facilities are a convenience and a benefit to the public. It is, therefore, the duty of the city to

preserve these facilities. It has another interest to protect; this park is the property of the city. By the act establishing the park the city, as successor of the Commissioners, is in duty bound to protect, preserve and control it for the use of the people as a park. It must prevent, if possible, its destruction. It must keep it as a "thing of beauty," and, we might add, "a joy forever" to the people. In the words of the 8th Sec. of the tripartite agreement, it must prevent "unnecessary noise or inconvenience to the public," in the park, the marring of its landscape beauty. The city is a complainant here in the performance of this duty and in the discharge of an important trust. It is a party to this tripartite agreement, and has a standing in this proceeding. It is here as the representative of the public, to compel these appellants to comply with the agreement under and subject to which they now enjoy the park right of way. This agreement is the source of appellants' title. Without it appellants must leave the park. If they would remain in the park they must comply with the terms of the deed, by and under which they are there, and this is true, without regard to the question, whether the covenants run with the land or of notice. The equities are with respondents. It is not urged that the compensation fixed by the Court below is inequitable or unfair, nor that it is impractical for appellants to yield the use to respondent, the Colorado Road, on the regulations fixed by the decree.

Police Regulation.

The Park Commissioners, under their power to protect the park, were authorized to exact these conditions as to the use of the tracks, and the County and Kansas City Roads were bound by them as, in the case of *Hayes vs. Mich. Cen. R. R. Co.*, 111 *U. S.* 228, above cited, such regulations or conditions are an exercise of police power, in the interest of the public safety and are regarded with favor by the Courts. Protection to human life comes *first*, and to property *afterwards*. Property interests are enjoyed subject to reasonable regulations for the public safety, and courts of equity compel compliance with them. This is so, particularly where a corporation is the party affected by the regulation—it derives its existence from the sovereign—is a creature of the State, and takes its charter subject to *such regulations* to a greater degree than a natural person. These conditions are in the public interest also. They increase on equitable terms facilities for transportation and general traffic. They discourage monopoly. They encourage competition. They prevent a *nuisance* in the park. In conclusion, our contention is:

a. That by the agreements, the appellants are bound to grant the use of the tracks through the park and to the Union Depot for a fair and equitable compensation, under reasonable rules and regulations, and that the terms of the decree are in accordance with this construction of the agreements.

b. That the record shows the *compensation* fixed by the decree is fair and equitable, that ap-

pellants assign no error as to amount of compensation allowed, or as to reasonableness of the rules and regulations adopted. The evidence produced, by both parties, without exception, showed they were reasonable and practical.

We have touched in detail upon the points suggested by this Record, from the stand-point of the respondents, and endeavored to convince the Court of the correctness of the decree of the Circuit Court. Viewed as a whole, what was intended to be done is at once apparent. The County and Kansas City Roads required the right of way. The Commissioners were willing to grant it on condition of confining all other railroads that might need a right of way through the park to this right of way. To this all parties agreed. If it is the right of respondents to have the benefit of the agreement, thus construed, there is a remedy by which this right can be enforced; injunction is the only complete remedy. Respondents are entitled to a complete remedy.

The interests involved are great. If the relief prayed for in the bill is denied, the public safety will be endangered, the commerce of a great city will be seriously injured, and a great park threatened with destruction. The public will suffer a triple calamity. The important private interests that have grown up on the basis of respondents' view of the agreement must also be seriously affected. The affirmance of the decree of the Circuit Court enjoining these appellants from refusing the use of the right of way to respondents, is the only effectual and complete remedy.

We might have rested on the report of the Master and the opinion of the Circuit Court, as they cover the points in the case, but, urged by the interests involved, we have been led to enter more in detailinto the questions presented by the Record.

The decree of the Circuit Court should be affirmed.

Respectfully submitted,

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